



WESTERN AUSTRALIA.

ANNO SEXTO

VICTORIÆ REGINÆ.

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No. IV.

**An Act to facilitate actions against Persons absent from the Colony, and against Persons sued as Joint Contractors.**

**WHEREAS** it is expedient that the existing Laws relative to Preamble.  
the suing absent parties, and to the proceedings against Joint  
Contractors, should be altered so as to facilitate the prosecution of  
just claims :—Be it therefore enacted by His Excellency the Governor

On return of non est inventus, and on affidavit filed, &c., Plaintiff may proceed against an absent defendant by Foreign Attachment.

of Western Australia, with the advice of the Legislative Council thereof, that in every action at law which shall be hereafter commenced in the Civil Court of Western Australia, wherein the Writ of Summons shall (as to any Defendant named therein) be returned non est inventus, if upon or after any such return an affidavit shall be filed on behalf of the Plaintiff that the cause of action arose within the said Colony, and that to the best of the deponent's belief such defendant does not reside within the said Colony, and is to the best of 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 (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 the Commissioner of the said Civil Court (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.

Form of Attachment, and how served.

II 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 Civil Court shall prescribe, and be returnable in the said Court on some day not less 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 monies, lands, chattels or debts, by delivering a copy thereof to each such Garnishee personally—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, the attachment shall be forthwith dissolved with costs to be paid by the plaintiff to such parties, and in such manner as the Court shall direct.

Proviso, as to proof of where cause of action accrued.

Public notice to be given.

III. 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 three successive Government Gazettes, and every such notice shall be in such form as the Court shall direct, and the last of such publications thereof shall be one

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week at the least before the day on which the Writ of Attachment shall be made returnable.

IV. AND be it enacted, that from the time of the service of the 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 bonâ 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 same Writ have had notice, and if any such Garnishee or person, without the leave of the Court, 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, and on proof of the facts, pay such damages to the plaintiff as such Court shall in that behalf think fit to order.

Property and debts bound from the time attachment served.

V. 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 shall proceed to enquire and determine whether in fact the plaintiff's cause of action arose within the said Colony, 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 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

Inquiry as to property in Garnishee's hands.

Attendance of parties.

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 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 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 appear under the circumstances to be reasonable or just so to do, it shall be lawful for the Court to dispense with the attendance of any such Garnishee upon his submitting to be examined upon oath before the Commissioner of the Court, or upon such other terms as such Court shall impose; and where any such Garnishee shall attend in obedience to any such Writ or Summons, it shall be lawful for the Court to award him the reasonable expenses of such attendance, to be paid by the plaintiff.

Disposal of goods, &c.,  
by leave of Court:

VI. AND be it enacted, that if any such Garnishee or person, in whose hands any such lands, goods, or property or debts 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, debt, or other chose in action, or any part thereof, pending such Attachment, and shall apply for that purpose to the Court, it shall be lawful for the said Court (due notice having been given to the plaintiff of such intended application) to authorise such Garnishee or person to sell or dispose of 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 thereafter be 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 shall think fit to order.

VII. 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 proceed thereon in the action as if such defendant resided in the Co-

lony 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.

VIII. AND be it enacted, that so soon as upon any such examination or enquiry as aforesaid, it shall be ascertained by the Court 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) be made available for the purpose of making satisfaction to the plaintiff as aforesaid, the said Court shall forthwith order the same (or such part or parts thereof respectively as such Court shall think proper in that behalf) to be thenceforward holden for that purpose, and to continue subject to such Attachment accordingly, or to be sold or otherwise disposed of, if such Court 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 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 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 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 so lodged with the Sheriff on different days, the plaintiffs shall be entitled to satisfaction respectively, according to the priority of each in such lodgment.

IX. 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 the Commissioner of the said Court, enter into a Bond, with two sufficient sureties to be approved of by such Commissioner, acknowledging himself and themselves to be indebted to the Defendant against whom such Attachment shall have so issued in

such sum as the Court shall think fit to order, conditioned amongst other things to repay all such sums as the Plaintiff shall realize 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 alledged 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.

After judgment Plaintiff may issue fieri facias.

X. 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 fieri facias upon such Judgment to be from time to time issued, as in any ordinary case for the amount of the debts and 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 their 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 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 debts 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 chose in action as aforesaid, no sale or other disposition thereof shall take place except by order of the Court, and upon the application of the Plaintiff, it shall be lawful for the said Court at any time, in 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 to show why he should not forthwith pay the amount of such debt to such Plaintiff, and if no sufficient cause is 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.

Compelling payment of debts due to defendant under attachment.

XI. 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 the Commissioner of the said Court, enter into a Bond with two sufficient sureties, acknowledging himself and themselves to be indebted to the plaintiff in such sum as the Court 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, to plead to, and 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 for dissolving Foreign attachment.

XII. 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 of all costs by him at any time thereby sustained), it shall be lawful for the said Court to cause the merits so alledged 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 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, shall be sworn before the Commissioner, or some

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

Officer of the Court, or person authorized to take affidavits to be used in the said Court

Property in possession  
of any co-defendants  
Wife.

XIII. 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 in 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.

Provision in case of ab-  
sent defendants sued as  
copartners.

XIV. PROVIDED always, and be it enacted, that in all cases wherein two or more defendants shall be sued as copartners, 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, then if, at any time after such return, an affidavit shall be filed that, to the best of the deponent's knowledge and belief, the defendant sued did in fact, when the cause of action accrued, carry on business in the said Colony, as a copartner 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 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 Attorney, to be published in the Government Gazette 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 publication of the same in the said Gazette), such defendant shall not appear, the plaintiff may proceed as if he or they resided in the said Colony, and had appeared to the action in person.

Similar provision where  
defendants not sued as  
copartners.

XV. AND be it enacted, that the like proceedings may be had, where two or more defendants shall be sued, although not as copart-

ners (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, and that the defendant or defendants as to whom the return of non est inventus is 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 to such an amount, and in such form, as the Court 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 defendant, as are hereinbefore provided with respect to defendants against whose property there shall have issued as aforesaid any Writ of Foreign Attachment.

XVI. AND whereas, in some cases, business is carried on in the said Colony by persons in copartnership, or by one individual or more assuming the style of a copartnership, or acting as agent or agents for a copartnership, and in some of those cases the names of the actual members of such copartnership, 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 copartnership, and the several members thereof, or the persons or person having carried on business under the style of any such copartnership, may be sued in any action at law in the name or names of any one or more of the members of such copartnership, 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 copartnership, 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 copartnership, it shall be sufficient to mention the name or names of such one or more member or members, or of such agent or agents in behalf of such copartnership, and every judgment obtained in any such action shall have the same effect and operation upon the property, both real and personal, of such copartnership, 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 copartnership had been actually and in fact a defendant in the action.

Copartnerships all of whose members are not known.

Proviso.

XVII 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 copartnership 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 copartnership; And provided, also, that no agent sued on behalf of a copartnership 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 copartnership, or be liable in person or in property to any judgment obtained in such action.

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

XVIII. 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.

Attachment and execution may be pleaded in bar.

XIX. 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 until the attachment shall be dissolved, or the proceedings thereupon be otherwise determined; and in such plea it shall only be necessary to state shortly that such Writ of Attachment was issued, and to set out the substance of the order finally made thereupon, and then to allege that the property sought to be recovered was taken under a writ of execution issued after such order.

Act to extend only to cases of contract.

XX. 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.

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XXI. PROVIDED always and be it enacted, that this Act shall not be deemed or taken to apply to any action to be brought against any person who shall have left the Colony previously to the passing of this Act until one year after the date hereof. Act not to apply for one year to parties who have left the Colony previously to the passing of the Act.

XXII. AND be it enacted, that absence from the said Colony 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 not. The term "absence."

XXIII. AND be it enacted, that it shall be lawful for the Court for the more satisfactory determination of any question of fact arising before such Court 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 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 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 shall in all cases whatsoever of applications made to, or proceedings had or taken before or by authority of the said Court or otherwise under this Act, have full power to adjourn the case or proceedings from time to time, and in all cases to refuse or award costs, the same to be paid by and to such party or parties as the Court shall in each case think fit to enter. The Court may make rules and award costs, and direct trials before a jury.

XXIV. AND be it enacted, that this Act shall be and continue in force for five years after the date of its passing the Legislative Council. Duration of the Act.

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Act may be amended. XXV. AND be it enacted, that this Act may be amended or repealed by any Act to be passed during the present Session.

“JOHN HUTT,”  
GOVERNOR.

*Passed the Council* }  
*11th Aug., 1842.* }

EDWARD C. SOUPER.  
Acting Clerk of the Council.