



ANNO VICESIMO QUINTO ET VICESIMO SEXTO

# VICTORIÆ REGINÆ.

A.D. 1862.

No. 3.

*10. 9. 25. 1862*

*An Act for the further Amendment of the Process, Practice, and Mode of Pleading in and Enlarging the Jurisdiction of the Supreme Court of South Australia.*

[Assented to, 21st October, 1862.]

**W**HEREAS it is desirable further to improve the process, <sup>Preamble.</sup> practice, and mode of pleading on the Common Law Side of the Supreme Court of South Australia, and in some respects to enlarge the jurisdiction of the said Court—Be it therefore Enacted, by the Governor-in-Chief of the Province of South Australia, with the advice and consent of the Legislative Council and House of Assembly of the said Province, in this present Parliament assembled, as follows:—

## Relief against Forfeiture.

1. In the case of any ejection for a forfeiture brought for non-payment of rent, the Court or a Judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, up to and within the like time, after execution executed, and subject to the same terms and conditions in all respects, as to payment of rent, costs, and otherwise, as in the Supreme Court in its equitable jurisdiction; and if the lessee, his executors, administrators, or assigns, shall upon such proceeding be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease.

Relief against forfeiture for nonpayment of rent.

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2. In the case of any ejection for a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, the Court or a Judge shall have power, upon rule or summons, to give relief

Relief against forfeiture for non-insuring.

23 Vic., No. 6.

relief in a summary manner, but subject to appeal as hereinafter mentioned, in all cases in which such relief may now be obtained in the Supreme Court, under the provisions of an Act of the Governor and Parliament of South Australia, passed in the Session of Parliament held in the twenty-third year of the present reign, intituled "An Act to Amend the Law of Property and for other Purposes," and upon such terms as would be imposed in such Court.

Minute of relief granted.

3. Where such relief shall be granted, the Court or a Judge shall direct a minute thereof to be made, by endorsement on the lease or otherwise.

#### Appeal.

Appeal to the Court from order of Judge.

4. Any order made by a Judge upon an application for relief under the provisions of this Act shall be subject to an appeal to the Court, and may be discharged, varied, or set aside by the Court upon such terms as the Court shall think fit, on application made thereto by any party dissatisfied with such order.

#### Interpleader Proceedings.

Relief where goods are taken in execution under process of Supreme Court.

1 & 2 W. IV., c. 58.

5. Where an action has been commenced in respect of a common law claim, for the recovery of money or goods, or where goods and chattels have been taken, or are intended to be taken, in execution under process issued from the Court, and the defendant in such action, or the Sheriff, or other officer, has applied for relief under the provisions of an Act made and passed in the Session of Parliament held in the first and second year of the reign of His late Majesty King William the Fourth, intituled "An Act to enable Courts of Law to give Relief against Adverse Claims made upon Persons having no Interest in the subject of such Claims," it shall be lawful for the Court or a Judge, to whom such application is made, to exercise all the powers and authorities given to them by this Act and the last-mentioned Act, though the titles of the claimants to the money, goods, or chattels in question, or to the proceeds or value thereof, have not a common origin, but are adverse to and independent of one another.

Court or Judge may direct sale of goods seized in execution.

6. When goods or chattels have been seized in execution by a Sheriff or other officer, under process of the Court, and some third person claims to be entitled, under a bill of sale or otherwise, to such goods or chattels, by way of security for a debt, the Court or a Judge may order a sale of the whole or part thereof, upon such terms as to the payment of the whole or part of the secured debt or otherwise as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such Court or Judge may seem just.

Power to Court or Judge to decide summarily in certain cases.

7. Upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the Court or Judge, wherever from the smallness of the

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the amount in dispute, or of the value of the goods seized, it shall appear to them or him desirable and right so to do at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner upon such terms as they or he shall think fit to impose, and to make such other rules and orders therein as to costs and all other matters as may be just.

8. In all cases of interpleader proceedings where the question is one of law and the facts are not in dispute, the Judge shall be at liberty, at his discretion, subject to appeal as hereinbefore mentioned, to decide the question without directing an action or issue, and, if he shall think it desirable, to order that a special case be stated for the opinion of the Court.

Special case may be stated where facts undisputed.

9. The proceedings upon such case shall as nearly as may be, be the same as upon a special case stated under "The Supreme Court Procedure Amendment Act, 1853."

Proceedings on special case in Court below.

10. The judgment in any such action or issue as may be directed by the Court or Judge in any interpleader proceedings, and the decision of the Court or Judge in a summary manner, unless in case of appeal, shall be final and conclusive against the parties, and all persons claiming by, from, or under them.

Judgment and decision to be final.

11. All rules, orders, matters, and decisions to be made and done in interpleader proceedings under this Act (excepting only affidavits) may, together with the declaration in the cause, if any, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the same may be evidence in future times if required, and to secure and enforce the payment of costs directed by any such rule or order, and every such rule or order so entered shall have the force and effect of a judgment in the Supreme Court.

Rules, orders, &c., made in interpleader proceedings may be entered of record and made evidence.

#### Procedure and Practice.

12. The joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favor of the plaintiffs by whom the action is brought, or of one or more of them, or in case of any question of misjoinder being raised, then in favor of such one or more of them as shall be adjudged by the Court to be entitled to recover: Provided always, that the defendant though unsuccessful shall be entitled to his costs occasioned by his joining any person or persons in whose favor judgment is not given, unless otherwise ordered by the Court or Judge.

Joinder as plaintiffs of all persons supposed to be legally entitled.

13. Upon the trial of such cause, a defendant who has therein pleaded a set-off, may obtain the benefit of his set-off by proving either that all the parties named as plaintiffs are indebted to him, notwithstanding that one or more of such plaintiffs was or were improperly joined, or on proving that the plaintiff or plaintiffs  
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Defendant to have benefit of set-off though some plaintiffs improperly joined.

who establish their right to maintain the cause, is or are indebted to him.

No other action for same claim to be brought.

14. No other action shall be brought against the defendant by any person so joined as plaintiff in respect of the same cause of action.

Payment into Court in replevin.

15. The plaintiff in replevin may, in answer to an avowry, pay money into Court in satisfaction in like manner, and subject to the same proceedings as to costs and otherwise, as upon a payment into Court, by a defendant, in other actions.

Effect of such payment.

16. Such payment into Court in replevin shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond.

Payment into Court in action on money bonds and for detainer.

17. In any action brought upon a bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, with a penalty, and in any action for detaining the goods of the plaintiff, it shall be lawful for the defendant, by leave of the Court or a Judge, and upon such terms as they or he shall think fit, to pay into Court a sum of money to answer the claim of the plaintiff in respect of such bond in the former case, and in the latter case to the value of the goods alleged to be detained; and such payment into Court shall be made and pleaded in like manner, and according to the provisions of "The Supreme Court Procedure Amendment Act, 1853;" and the like proceedings may be had and taken thereupon, as to costs and otherwise.

Dower and writ of right of dower abolished as real actions, and to be commenced by writ of summons.

18. No writ of right of dower or writ of dower, *unde nihil habet*, shall be brought after the commencement of this Act in any Court whatsoever; but where any such writ or action would now lie, an action may be commenced by writ of summons issuing out of the Court, in the same manner and form as the writ of summons in an ordinary action; and upon such writ shall be endorsed a notice that the plaintiff intends to declare in dower.

Writ and all proceedings thereupon to be the same as in ordinary actions.

19. The service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, judgment, execution, and all other proceedings and costs upon such writ shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons; and the provisions of "The Supreme Court Procedure Amendment Act, 1853," and of "The Supreme Court Procedure Act, 1855-6," shall apply to the writ and pleadings, and proceedings thereupon.

Judge may refuse to interfere in proceedings to attach debts.

20. In proceedings to obtain an attachment of debts under "The Supreme Court Procedure Act, 1855-6," the Judge may, in his discretion, refuse to interfere where, from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious.

21. Whenever,

21. Whenever, in proceedings to obtain an attachment of debts under the last-mentioned Act, it is suggested by the garnishee that the debt sought to be attached belongs to some third person who has a lien or charge upon it, the Judge may order such third person to appear before him and state the nature and particulars of his claim upon such debt.

Proceedings where third person has a lien on the debt.

22. After hearing the allegations of such third person under such order, and of any other person whom, by the same or any subsequent order the Judge may think fit to call before him, or in case of such third person not appearing before him upon such summons, the Judge may order execution to issue, to levy the amount due from such garnishee, or the judgment creditor to proceed against the garnishee, according to the provisions of the last-mentioned Act, and he may bar the claim of such third person, or make such other order as he may think fit, upon such terms, in all cases with respect to the lien or charge (if any), of such third person, and to costs, as he shall think just and reasonable.

Judge may bar claim of third person, and make orders.

23. The provisions of the last-mentioned Act, so far as they are applicable shall apply to any order, and the proceedings thereon made and taken in pursuance of the herein next before mentioned powers under this Act.

Provisions of 1855-6, No. 24, to apply to orders.

24. In all cases in which a writ of mandamus or of injunction is issued under the provisions of the last-mentioned Act, such writ shall, unless otherwise ordered by the Court or a Judge, in addition to the matter directed to be inserted therein, command the defendant to pay to the plaintiff the costs of preparing, issuing, and serving such writ; and payment of such costs may be enforced in the same manner as costs payable under a rule of Court are now by law enforceable.

Costs of writs of mandamus and injunction, may be included in writs.

25. Writs of injunction against a corporation may be enforced either by attachment against the Directors or other officers thereof, as in the case of a mandamus, or by writ of sequestration against their property and effects, to be issued in such form, and tested, and returnable in like manner as writs of execution, and to be proceeded upon and executed in like manner as writs of sequestration issuing out of the Court, in its equitable jurisdiction.

Mode of enforcing writs of injunction against corporations.

26. The seventy-seventh section of the last-mentioned Act shall be and hereby is repealed; and from and after the passing of this Act, the Court or any Judge thereof may, upon summary application, by rule or order exercise such and the like jurisdiction as may be exercised by the Court of Chancery, in England, under the provisions of the ninth part of an Act of the Imperial Parliament, intituled "The Merchant Shipping Act, 1854."

Enactment in lieu sec. 77th of 1855-6, No. 24.

27. It shall be lawful for the Court and every Judge thereof, and any Judge sitting at *nisi prius*, at all times to amend all defects and errors

Amendments.

errors in any proceedings under the provisions of this Act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs and upon such terms as to the Court or Judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made if duly applied for.

General Rules may be made by the Judges.

28. It shall be lawful for the Judges or any two of them, of whom the Chief Justice of the said Court shall be one, from time to time to make all such general rules and orders for the effectual execution of this Act and of the intention and object thereof, and for fixing the costs to be allowed for and in respect of the matters herein contained and the performance thereof as in their judgment shall be necessary or proper, and for that purpose to meet from time to time as occasion shall require: Provided that nothing herein contained shall be construed to restrain the authority or limit the jurisdiction of the said Court or of the Judges thereof to make rules or orders, or otherwise to regulate and dispose of the business therein.

New forms of writs and other proceedings.

29. Such new or altered writs and forms of proceedings may be issued, entered, and taken, as may by the Judges or any two of them, of whom the Chief Justice shall be one, be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the Judges shall from time to time think fit to order; and such writs and proceedings shall be acted upon and enforced in such and the same manner as writs and proceedings of the said Court are now acted upon and enforced, or as near thereto as the circumstances of the case will admit; and any existing writ or proceeding, the form of which shall be in any manner altered in pursuance of this Act, shall nevertheless be of the same force and virtue as if no alteration had been made therein, except as far as the effect thereof may be varied by this Act.

Court to have same powers in and out of term.

30. The Court shall have and exercise out of term all the powers and authorities it now has and may exercise in term.

Interpretation of terms.

31. In the construction of this Act the word "Court" shall be understood to mean the Supreme Court of South Australia, and the word "Judge" shall be understood to mean a Judge of the said Court; and the word "action" shall be understood to mean any action in the said Court.

Short title.

32. In citing this Act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Common Law Procedure Act, 1862."

In the name and on behalf of the Queen I hereby assent to this Act.

D. DALY, Governor.