



1845.

No. 9.

*By His Excellency GEORGE GREY, ESQUIRE, Governor and Commander-in-Chief of Her Majesty's Province of South Australia and its Dependencies, and Vice-Admiral of the same, by and with the advice and consent of the Legislative Council.*

*AN ORDINANCE for adopting in South Australia certain parts of an Act made and passed in the Imperial Parliament, which was held in the First and Second Years of the Reign of Her present Majesty, intituled "An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain cases; for extending the remedies of Creditors against the property of Debtors; and for amending the Laws for the relief of Insolvent Debtors in England."*

**W**HEREAS an Act was made and passed in the Imperial Par-  
liament which was held in the First and Second Years of  
the Reign of Her present Gracious Majesty, intituled "An Act for  
abolishing Arrest on Mesne Process in Civil Actions, except in  
certain cases; for extending the remedies of Creditors against the  
property of debtors; and for amending the laws for the relief  
of Insolvent Debtors in England:" And whereas it is deemed  
expedient to adopt so much of the said Act as can be applied in the  
administration of Justice in the present circumstances of this  
Colony; in conformity, therefore, with the said recited Act:

Preamble.

Be it Enacted, by His Excellency the Governor of South  
Australia, by and with the advice and consent of the Legislative  
Council thereof, That all personal actions in the Supreme Court  
shall be commenced by writ of summons.

All actions to be  
commenced by writ  
of summons.

II. And be it Enacted, That if a plaintiff in any action in the  
Supreme Court in which the defendant is now liable to arrest,  
whether

The Judge of the  
Supreme Court may  
order defendant to  
be arrested in certain  
cases.

whether upon an order of a Judge, or without such order, shall by the affidavit of himself, or of some other person, show to the satisfaction of a Judge of the said Court that such plaintiff has a cause of action against the defendant to the amount of Twenty Pounds or upwards, or has sustained damage to that amount, and that there is probable cause for believing that any defendant is about to quit the Province unless he be forthwith apprehended, it shall be lawful for such Judge, by a special order, to direct that such defendant so about to quit the Province shall be held to bail for such sum as such Judge shall think fit, not exceeding the amount of the debt or damages; and thereupon it shall be lawful for such plaintiff within the time which shall be expressed in such order, but not afterwards, to sue out a writ of *capias* against any such defendant so directed to be held to bail, which writ of *capias* shall be in the form contained in the Schedule to this Ordinance annexed, and shall bear date on the day on which the same shall be issued.

Sheriff may proceed to arrest defendant. Defendant to remain in custody until he finds bail, or makes deposit.

III. And be it Enacted, That the Sheriff, or other officer, to whom any such writ of *capias* shall be directed, shall, within one calendar month after the date thereof, including the day of such date, but not afterwards, proceed to arrest the defendant thereupon; and such defendant, when so arrested, shall remain in custody until he shall have given a bail-bond to the Sheriff, or shall have made deposit of the sum endorsed on such writ of *capias*, together with Ten Pounds for costs, according to the present practice of the Supreme Court; and all subsequent proceedings as to the putting in and perfecting special bail, or of making deposit and payment of money into Court instead of putting in and perfecting special bail, shall be according to the like practice of the said Court, or as near thereto as the circumstances of the case will admit.

Order may be made at any stage of proceedings before final judgment.

IV. And be it Enacted, That any such special order may be made, and the defendant arrested in pursuance thereof, at any time after the commencement of such action, and before final judgment shall have been obtained therein; and that a defendant in custody upon any such arrest, and not previously served with a copy of the writ of summons, may be lawfully served therewith.

Defendant may apply for his discharge forthwith. Judge may discharge defendant or not. Order of Judge may be appealed from.

V. And be it Enacted, That it shall be lawful for any person arrested upon any such writ of *capias*, to apply at any time after such arrest to a Judge of the said Court, or to the Court, for an order or rule on the plaintiff in such action, to show cause why the person arrested should not be discharged out of custody; and that it shall be lawful for such Judge or Court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as to such Judge or Court shall seem fit: Provided that any such order made by a Judge may be discharged or varied by the Court, on application made thereto by either party dissatisfied with such order.

VI. And

VI. And whereas it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment, or a cognovit actionem, due information of the nature and effect thereof: Be it Enacted, That from and after the time appointed for the commencement of this Ordinance, no warrant of attorney to confess judgment in any personal action, or cognovit actionem given by any person, shall be of any force unless there be present some attorney of the Supreme Court on behalf of such person, expressly named by him and at his request, to inform him of the nature and effect of such warrant of attorney, or cognovit, before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney.

Warrants of attorney and cognovit actionem to be executed in the presence of an attorney on behalf of the person.

VII. And be it Enacted, That a warrant of attorney to confess judgment or cognovit actionem not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same.

Warrant, &c., not formally executed, invalid.

VIII. And be it Enacted, That by virtue of any writ of fieri facias to be sued out of the Supreme or any inferior Court after the time appointed for the commencement of this Ordinance, or any precept in pursuance thereof, the Sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes (whether of the Governor and Company of the Bank of England, or any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money belonging to the person against whose effects such writs of fieri facias shall be sued out; and may and shall pay or deliver to the party suing out such execution, any money or bank notes which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, as a security or securities for the amount by such writ of fieri facias directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such Sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and that the payment to such Sheriff or other officer by the party liable, on any such cheque, bill of exchange, promissory note, bond, specialty, or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levying such execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security; and such Sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be

Sheriff empowered to seize money, bank notes, &c., and to pay money or bank notes to execution creditor, and to sue for amount secured by bills of exchange and other securities. Proviso as to indemnity of Sheriff.

be levied, together with Sheriff's poundage and expenses, any surplus shall remain in the hands of such Sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued: Provided that no such Sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action.

Securities not realized to be relinquished if the person taken in execution.

IX. And be it Enacted, That if any judgment creditor who under the powers of this Ordinance shall have obtained any charge or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then and in such case such judgment creditor shall be deemed and taken to have relinquished all right and title to the benefit of such charge or security, and shall forfeit the same accordingly.

Judgment debts to carry interest.

X. And be it Enacted, That every judgment debt shall carry interest at the rate of Five Pounds per centum per annum from the time of entering up the judgment, or from the time of the commencement of this Ordinance in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.

Decree and orders of Courts sitting in matters of equity, &c., to have effect of judgments.

XI. And be it Enacted, That all decrees and orders of the said Supreme Court sitting in Equity, and all rules of the said Court made in any matter of Common Law, and all orders of the said Court, or of any Judge thereof in matters of insolvency or of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the effect of judgment in the said Supreme Court, and the person to whom any such moneys, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this Ordinance; and all powers hereby given to the Judge of the said Supreme Court with respect to matters of Common Law depending in the same Court, shall and may be exercised by the said Court with respect to matters of Equity therein depending, and by any Judge thereof in matters of lunacy or of insolvency; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys, or costs, charges, or expenses, are by such orders or rules respectively directed to be paid.

XII. And

XII. And be it Enacted, That such new or altered writs shall be sued out of the Supreme Court as may be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the Judge or Judges of the said Court shall from time to time think fit to order; and the execution of such writs shall be enforced in such and the same manner as the execution of writs of execution is now enforced, or as near thereto as the circumstances of the case will admit, and that any existing writ, the form of which shall be in any manner altered in pursuance of this Ordinance, shall nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this Ordinance.

New writs to be framed.

XIII. And be it Enacted, That this Ordinance shall commence and take effect from and after the first day of August next.

Commencement of Ordinance.

G. GREY,  
Governor and Commander-in-Chief.

*Passed the Legislative Council this  
Tenth day of July, One Thousand  
Eight Hundred and Forty-five.*

W. L. O'HALLORAN,  
Clerk of Council.

SCHEDULE TO WHICH THIS ORDINANCE REFERS.

VICTORIA, &c., to the Sheriff of South Australia, Greeting.

WE command you that you take C. D., if he be found in your Bailiwick, and him safely keep until he shall have given you bail, or made deposit with you according to law, in an action on promises (or of debt, &c.), at the suit of A. B., or until the said C. D. shall, by other lawful means, be discharged from your custody: And we do further command you that on execution hereof, you do deliver a copy hereof to the said C. D.: And we hereby require the said C. D. to take notice, that within eight days after the execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Supreme Court to the said action; and that in default of so doing such proceedings may be had and taken as are mentioned in the warning written or endorsed hereon: And we do further command you, that immediately after the execution hereof, you do return this writ to our said Supreme Court, together with the manner in which you shall have executed the same, and the day of the execution thereof; or if the same shall remain unexecuted, then that you do so return the same at the expiration of one calendar month from the date hereof, or sooner if you shall be thereto required by order of the said Court or any Judge thereof.

Witness—

at Adelaide, the

day of

*Memorandum to be subscribed to the Writ.*

This writ to be executed within one calendar month from the date thereof, including the day of such date, and not afterwards.

*A warning to the Defendant.*

If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed on the bail bond.

*Indorsements to be made on the Writ.*

Bail for \_\_\_\_\_ pounds, by order of (*naming the person making the order*)  
dated this \_\_\_\_\_ day of \_\_\_\_\_

This writ was issued by E. F., attorney for the plaintiff (*or plaintiffs*) within named; or

This writ was issued in person by the plaintiff within named, who resides at (*mention the city, town, street, and number of the house of the plaintiff's residence, if any such there be*).