



ANNO QUINTO

GULIELMI IV. REGIS,

No. 3,

By His Excellency Colonel GEORGE ARTHUR, Lieutenant-Governor of the Island of Van Diemen's Land and its Dependencies, with the advice of the Legislative Council.

AN ACT to provide for and regulate Process in Actions at Law against Persons absent from the Colony.

WHEREAS by the laws at present in force there are no means by which actions at law can be successfully prosecuted against persons absent from the Colony because there is no process by foreign attachment or otherwise for compelling either defence or appearance on behalf of any such defendant—

PREAMBLE,

BE IT THEREFORE ENACTED by His Excellency Colonel GEORGE ARTHUR Lieutenant-Governor of Van Diemen's Land and its Dependencies with the advice of the Legislative Council that in every action at law which shall hereafter be commenced in the Supreme Court of Van Diemen's Land 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 this Island or its dependencies and that to the best of the deponent's belief such defendant does not reside within this Island 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 this Island or

On any return of non est inventus and on affidavit filed &c. plaintiff may proceed against an absent defendant by foreign attachment.

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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.

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 shall be issued at the plaintiff's instance as of course and every such writ shall be in the form or to the effect of the form contained in the Schedule to this Act marked A and be returnable into the said Court either in Term or in vacation 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 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 then 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 arose as aforesaid and that in case it shall at any time appear that the cause of action did not arise within this Island 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.

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 not less than twice in the Hobart Town Gazette and also not less than twice in one other Hobart Town newspaper and not less than twice in one Launceston newspaper and every such notice shall be in the form or to the effect of the form contained in the Schedule to this Act marked B 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 so made returnable.

Property and debts bound from the time of attachment served.

IV. 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 the same 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 other person or persons and all debts of every kind then due by any such garnishee to such defendant although

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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 said writ have had notice—AND any such garnishee or person who shall without the leave of the said Court at any time after such service and before the said attachment shall be dissolved as hereinafter mentioned 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 shall upon the application in a summary way of such plaintiff to the said Court and on proof of the facts to the satisfaction of the said Court pay such damages to the said plaintiff as the said Court shall in that behalf think fit to order,

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 or one of the Judges thereof shall proceed to enquire and determine whether in fact the plaintiff's cause of action arose within this Island or its dependencies and if so then what lands monies chattels and other property as aforesaid 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 same 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 the same 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 enquiry 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 vivâ 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 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.

Enquiry as to property in garnishee's hands,

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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 as aforesaid shall have been so attached shall be desirous of disposing of the same or any part thereof or of receiving the amount of any such bill or bond or other chose in action or any part thereof pending such attachment and shall apply for that purpose to the said Court or during vacation to one of the said Judges it shall be lawful for the said Court or Judge (due notice having been given to the plaintiff of such intended application) to authorise such garnishee or person to sell or dispose of any such property or receive any such amount and to hold the proceeds of such sale or disposal or the amount so received subject to such attachment as aforesaid or otherwise for the satisfaction of the plaintiff as to such Court or Judge shall seem fit.

After attachment
returned plaintiff
may proceed in
the action.

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 cause an appearance to be entered for the defendant against whom the same shall have so issued and to proceed thereon as if such defendant resided in Hobart Town and had appeared to the action in person—PROVIDED that such bond as is in that behalf hereinafter mentioned shall have been duly entered into before final judgment be given therein.

Court to deter-
mine what pro-
perty is to conti-
nue subject to the
attachment.

VIII. AND BE IT ENACTED that so soon as upon any such examination or enquiry as aforesaid it shall be ascertained by the Court or sitting Judge what lands monies or other such property and debts as aforesaid can be made available for the purpose of making such 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 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 last aforesaid shall be intended to apply it shall be lawful for the said Court or either of the Judges thereof at any time to direct that the said attachment shall be dissolved.

Plaintiff to enter
into a bond to ac-
count &c.

IX. AND BE IT ENACTED that within one calendar month next after any such writ of attachment shall have issued as aforesaid the plaintiff at whose suit the same shall have been so issued or if absent

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some person on his behalf shall before the said Court or one of the Judges thereof enter into a bond with two sufficient sureties to be approved of by such Court or Judge acknowledging himself and themselves to be indebted to the defendant against whom such attachment shall have so issued in such sum as the said Court or Judge shall think fit to order the condition of which said bond shall be in the form or to the effect of the form contained in the Schedule to this Act marked C— 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.

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 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 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 only and to receive any such property in satisfaction or part satisfaction of such debt or damages and costs at an amount or value to be fixed by the plaintiff 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 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 at any time in a summary manner it shall be lawful for the said Court or Judge to authorise 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 show cause why he should not forthwith pay the same amount to such plaintiff and if no sufficient cause be shown 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 of the like nature.

After judgment plaintiff may issue a fieri facias.

What may be taken under it,

XI. PROVIDED ALWAYS AND BE IT ENACTED that if pending any such writ of foreign attachment as aforesaid or at any time

Provision for dissolving foreign attachment.

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before final judgment obtained in the action in which such writ issued the defendant against whom the same attachment shall have issued or any person on his behalf shall before the said Court or one of the Judges thereof enter into a bond with two sufficient sureties to be approved of by such Court or Judge acknowledging himself and themselves to be indebted to the plaintiff in such sum as the said Court or 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 it shall be lawful for such defendant or person on his behalf upon entering an appearance in such action (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 within two years.

XII. AND BE IT ENACTED that if after any such 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 two 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 enquired into and determined in such manner and form either by a feigned issue between the parties or otherwise and at such time and under such 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 enquiry and determination had shall thereupon give such judgment or 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 in Van Diemen's Land or its dependencies shall be sworn before the said Court or one of the Judges thereof or before some Officer of the Court or person authorised or to be authorised to take affidavits to be used in the said Court or if

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made elsewhere 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 official seal of such Magistrate.

XIII. AND BE IT ENACTED that the property of any such absent defendant as aforesaid may under the provisions of this Act be equally attached and taken in the custody or power of any co-defendant as of any such garnishee or person as aforesaid not being a party to the action 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 in any case be defeated by reason of any such co-defendant or other garnishee as aforesaid being or claiming to be jointly interested with such defendant therein either as partner or otherwise.

Property in possession of any co-defendant.

XIV. PROVIDED ALWAYS AND BE IT ENACTED that in all cases wherein two or more defendants shall be sued as co-partners and as to either 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 this Island or its dependencies as a co-partner jointly with the defendant as to whom there shall have been such return of non est inventus and that such last-mentioned defendant is absent from the Colony it shall be lawful for the plaintiff at his option to proceed against every such defendant (in case no appearance be entered for him) in the manner next hereinafter mentioned.

Provision in case of defendants sued as co-partners.

XV. AND BE IT ENACTED that thereupon or as soon after as conveniently may be the plaintiff shall cause a notice signed by himself or his attorney to be published in the Hobart Town Gazette and in not less than one other Hobart Town newspaper and one Launceston newspaper in the form or to the effect of the form in the Schedule to this Act marked D—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 Hobart Town Gazette) no appearance be entered for such defendant or defendants the plaintiff may cause such appearance to be entered and may proceed as if he or they resided in Hobart Town and had appeared to the action in person.

Such co-partners absent from the Colony to have notice.

XVI. AND WHEREAS in some cases business is or may be carried

Co-partnerships

all of whose members are not known.

Such co-partnerships may be sued in the name of any one member or agent.

Judgment against such defendant to operate against the co-partnership.

Proviso.

Agent not to be incompetent as a witness.

Pleas in abatement.

on in this Island 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 members of such co-partnership or some of them are not only absent from the colony but their names are or may be unknown—BE IT THEREFORE ENACTED that (in order to prevent any failure of justice in such cases) 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 but for this Act it would have been necessary to mention the names of all the members composing any such co-partnership it shall be sufficient to mention the name or names of such one or more member or members only or of such agent or agents on behalf of such co-partnership.

XVII. AND BE IT ENACTED that every judgment obtained or order made in any such action as last aforesaid shall have the same effect and operation upon the persons and property both real and personal of such co-partnership and of the several members thereof 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—AND every such judgment or order may be enforced against all such property as in ordinary cases of the like nature.

XVIII. 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 two preceding sections the style or firm of the co-partnership shall be specified and it shall distinctly appear that the defendant or defendants sued is or are so sued for and on behalf of such co-partnership—AND PROVIDED ALSO that no agent sued on behalf of any such 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 either in person or property to any judgment obtained in such action.

XIX. AND (for supplying a more full and effectual remedy in this behalf in all cases in which there are joint contractors one or more of whom shall be absent from the colony)—BE IT ENACTED that no plea in abatement shall hereafter be received on behalf of any defendant in any action in respect of the non-joinder therein of any person alleged

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to have been a joint contractor with such defendant unless it be expressly alleged in such plea that the person not joined is then resident at some place within this Island or its dependencies and where in particular.

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. Act to extend only to cases of contract.

XXI. AND BE IT ENACTED that absence from the Colony shall for the purposes of this Act be taken to be absence for the time being whether the party shall ever have been within this Island or not. The term "absence."

XXII. AND BE IT ENACTED that in all cases in which no provision or no sufficient provision in that behalf is by this Act made it shall be lawful for the said Supreme Court from time to time for the purpose of facilitating or more fully or effectually carrying any or either of the objects of this Act into execution 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 said Court or Judges 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 present 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 award or refuse costs the same to be paid by and to such party or parties as the Court or Judge shall in each case think fit to order. The Court may make rules and award costs.

GEORGE ARTHUR.

Passed the Legislative Council this fourth day of September one thousand eight hundred and thirty-four,

ADAM TURNBULL, *Clerk of the Council.*

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to or in which he is legally or equitably entitled or otherwise beneficially interested and whether solely or jointly with any other person or persons and all debts of every kind due by you to the said C. D. although the same or part thereof may be payable only at a future day are to the extent of the right title and interest of the said C. D. therein attached in your hands and [subject to any bonâ fide prior claims or liens thereon] are liable to the satisfaction of the above-named A. B. in the above-mentioned action—And if you shall before this attachment is dissolved sell or otherwise knowingly dispose of or part with any such property or pay over any such debt or any part thereof without the leave of the Supreme Court you will be liable to pay such damages to the said A. B. as the said Court shall in that behalf think fit to order.

A. B.

[or L. M. Plaintiff's Attorney.]

To Mr. G. H. [or G. H. R. M. and I. K. severally.]

SCHEDULE B.

In the Supreme Court }
of Van Diemen's Land. }

BETWEEN { A. B. PLAINTIFF
and
C. D. DEFENDANT [or C. D.
E. F. DEFENDANTS.]

WHEREAS an action has been commenced in this Court at the suit of the above-named A. B. against the above-named C. D. [or C. D. and E. F.] to recover [state shortly the cause of action in substance and the amount sworn to if for a sum certain] and it being alleged that the said C. D. does not reside within this Island or its dependencies a writ of foreign attachment has been issued returnable on the day of wherein G. H. of is garnishee [or G. H. of R. M. of and I. K. of are garnishees] Notice is hereby given thereof and that if at any time before final judgment in this action the said C. D. or any person on his behalf will give the security and notice and file the appearance or plea required by the Act of this Island intituled [insert title] the said attachment may be dissolved.

Dated this day of 183

A. B.

[or L.M. Plaintiff's Attorney.]

SCHEDULE C.

KNOW ALL MEN by these presents that We A. B. of
 &c. N. O. of &c. and P. Q. of
 &c. are and each of us is jointly and severally bound
 unto C. D. late of &c. in the penal sum of £
 to be paid to the said C. D. or his certain Attorney Executors
 Administrators or Assigns For which payment to be made
 we jointly and severally bind ourselves and each and every
 of us and our respective Heirs Executors and Administrators
 firmly by these presents Sealed with our seals Dated this
 day of 183

WHEREAS an action at law hath lately been commenced in the
 Supreme Court of Van Diemen's Land at the suit of the above-bounden
 A. B. against the above-named C. D. [or C. D. and another] and a writ
 of foreign attachment hath on the application of the said A. B. been
 issued therein—And whereas the said A. B. being about to proceed in
 the said action it is necessary for him to give the security required by
 the Act of this Island intituled "An Act to provide for and regulate
 "process in actions at law against persons absent from the Colony"
 and the above-bounden N. O. and P. Q. have agreed to become his
 sureties Now the condition of this obligation is that if the said A. B.
 his Executors or Administrators shall pay or cause to be paid to the
 said C. D. his Executors or Administrators all and every the sums and
 sum of money which he shall receive or recover in or by reason of the said
 action in case the judgment obtained therein shall be hereafter reversed
 or vacated and also all and every the sums and sum of money damages
 costs and charges which by the said Court shall at any time hereafter
 be adjudged or ordered to be paid by the said A. B. his Executors or
 Administrators to the said C. D. his Executors or Administrators for or
 by reason or on account of or in any manner relating to the said action
 and the said attachment or either of them or any proceedings hitherto
 taken or hereafter to be taken in or under the same respectively or any
 judgment that may be obtained or any execution or executions that
 may be issued in the same action—Then this obligation shall be void
 otherwise it is to remain in full force.

SCHEDULE D.

In the Supreme Court of }
Van Diemen's Land. }

BETWEEN { A. B. PLAINTIFF
 and
 { C. D. & E. F. DEFENDANTS.

WHEREAS an action has been commenced in this Court at the suit of the above-named A. B. against the above-named C. D. and E. F. as co-partners carrying on business under the style or firm of

 and no appearance has been entered for the said C. D. in the said action and he is alleged to be absent from the Colony : Notice is hereby given that unless the said C. D. or some person on his behalf shall enter an appearance for the said C. D. to the said action on or before the day of the said A. B. will cause such appearance to be entered for him in pursuance of the Act of this Island "for regulating process in actions against persons absent " from the Colony" and will proceed in the said action as if the said C. D. resided in Hobart Town and had appeared in person.

Dated this day of 183

A. B.

or L. T. Plaintiff's Attorney.

