



S U P P L E M E N T
TO THE
NEW SOUTH WALES
GOVERNMENT GAZETTE,
OF WEDNESDAY, AUGUST 19, 1840.
Published by Authority.

SATURDAY, AUGUST 22, 1840.

ANNO QUARTO.
VICTORIÆ REGINÆ.
No. 6.

By His Excellency Sir George Gipps, Knight, Captain-General and Governor-in-Chief of the Territory of New South Wales and its Dependencies, and Vice-Admiral of the same, with the advice of the Legislative Council.

An Act to consolidate and amend the Laws relating to Actions against Persons absent from the Colony, and against Persons sued as Joint Contractors.

WHEREAS an Act was passed by the Governor of New South Wales, with the Preamble, advice of the Legislative Council thereof, in the second year of the Reign of His late Majesty William IV., jesty King William the Fourth, in No. 7. intitled "*An Act for regulating 'Foreign Attachment in New South Wales,'*" and the same is in several particulars defective, and there are certain cases not within the scope or object of that Act, in which there is at present no provision for compelling appearance on behalf of Defendants absent from the said Colony; And whereas by an Act of Parliament passed in the third and fourth year of the Reign of His said late Majesty, intituled "*An Act for the further Act of Parlia- 'Amendment of the Law and the ment 3 and 'better Advancement of Justice,' 4 Wm. IV. c. 42, s. 8, 9, and 10, as to Pleas in Abate- joinder of absent parties, and it is ment. expedient to introduce the same into practice in the said Colony; and whereas for the purpose of remedying the defects, and introducing the provisions aforesaid, respectively, it is expedient to repeal the said first recited Act, and to consolidate the Laws respecting absent Defendants and Joint Contractors, in one Act only: Be it therefore enacted, by His Excellency the Governor of New South Wales, with the advice of the Legislative*

Council thereof, That from and after the first day of September next ensuing, the said first recited Act shall be, and the same is hereby repealed, except as to any writ of Attachment issued under Foreign Attach- the said Act before such first day ment Act, 2 Wm. of September, and as to matters IV., No. 7, re- done or thereafter remaining to pealed. be done under any such Writ, in respect to which all such proceedings may be taken as might have been taken if this Act had not been passed.

(On return of non est inventus and on Affidavit filed, &c., Plaintiff may proceed against an absent Defendant by Foreign Attachment.)

II. And be it enacted, That in every Action at Law which shall be hereafter commenced in the Supreme Court of New South Wales, 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 the said Colony or its Dependencies and that to the best of the deponent's belief such defendant does not reside within the said Colony 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 the said Colony or 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: Provided that, by leave of a Judge (where it shall appear that the 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.)

III. 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 Supreme Court shall prescribe, 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 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 in case it shall at any time appear that the cause of action did not arise within the said Colony 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.

(Public Notice to be given.)

IV. 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 the *New South Wales Government Gazette*, and not less than twice in one other Sydney Newspaper; and if the defendant or any Garnishee shall reside within the District of Port Phillip, then not less than twice also, in some newspaper published within such District; and every such notice shall be in such form as the Court shall direct, 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 made returnable.

(Property and Debts bound from the time Attachment served.)

V. 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 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 *bona 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 if any such Garnishee or person, without the leave of the Court or one of the Judges, 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, or any Judge thereof, and on proof of the facts, pay such damages to the plaintiff as such Court or Judge shall in that behalf think fit to order.

(Inquiry as to Property in Garnishee's hand.)

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

(Disposal of Goods, &c. by leave of Court.)

VII. 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 or paying (as the case be) the amount of any bill, bond, or debt, or other chose in action, or any part thereof, pending such Attachment, and shall

apply for that purpose to the Court, or to one of the 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 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 be thereafter 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 or Judge shall think fit to order.

(After Attachment returned, Plaintiff may proceed in the Action.)

VIII. 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 in the Action as if such defendant resided in Sydney in the Colony 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.

(Court to determine what property is to continue subject to Attachment.)

IX. And be it enacted, That so soon as upon any such examination or inquiry as aforesaid, it shall be ascertained by the Court or Sitting Judge, 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 or Judge) be made available for the purpose of making 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 aforesaid shall be intended to apply, or as to which no such order can be made, it shall be lawful for the said Court, or any of the Judges, 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, or any Judge, 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 lodged with the Sheriff on different days, the plaintiffs shall be entitled to satisfaction, respectively, according to the priority of each in such lodgment.

(Plaintiff to enter into a Bond to account, &c.)

X. 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 one of the Judges, or some Commissioner of the Supreme Court, enter into a bond, with two sufficient sureties, to be approved of by such Judge, or Commissioner, acknowledging himself and themselves to be indebted to the defendant against whom such attachment shall have so issued, in such sum as one of the Judges shall think fit to order, conditioned, amongst other things, to repay all such sums as the said Plaintiff shall recover 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 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.

(After Judgment Plaintiff may issue fieri facias.)

XI. 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 *feri 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) not only 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) 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 debt 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 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, it shall be lawful for the said Court, or any Judge thereof, at any time in a summary manner, 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 shew cause why he should not forthwith pay the amount of such debt to such plaintiff; and if no sufficient cause be 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.

(Provision for dissolving Foreign Attachment.)

XII. 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 one of the Judges of the said Court, enter into a bond, with two sufficient sureties, to be approved of by such Judge, acknowledging himself and themselves to be indebted to the plaintiff in such sum as the 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; then it shall be lawful for such Defendant or person entering into the said bond, upon entering an appearance, (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, notwithstanding Judgment against him.)

XIII. 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 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 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 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 within the said Colony of New South Wales or its Dependencies, shall be sworn before one of the Judges, or some Officer of the Court, or person authorised to take affidavits to be used in the said Court, or if 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 hand and seal of such Magistrate.

(Property in possession of any co-defendant or Wife.)

XIV. 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 with 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 absent defendants sued as Co-partners.)

XV. Provided always and be it enacted, That in all cases wherein two or more defendants shall be sued as Co-partners, 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, 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 the said Colony or its Dependencies, as a co-partner 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 case no appearance be entered for him) 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 his attorney, to be published in the *New South Wales Government Gazette*, and in not less than one other Sydney Newspaper, 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 day of the publication of the same in the said Gazette,) no appearance be entered for the defendant or defendants so being absent from the Colony, the plaintiff may cause such appearance to be entered, and 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 Co-partners.)

XVI. And be it enacted, That the like appearance may be entered, and proceedings had, where two or more defendants shall be sued, although not as co-partners, (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 or its Dependencies, and that the defend-

ant or defendants as to whom the return of *non est inventus* was 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, before any such appearance as aforesaid shall be entered by him to such amount, and in such form as a Judge 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 hereinbefore provided with respect to defendants against whose property there shall have been issued as aforesaid any Writ of Foreign Attachment.

(Co-partnerships, all of whose members are not known.)

XVII. And whereas in some cases business is carried on in the said Colony 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 names of the actual members of such co-partnership 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 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 it would have been necessary, if this Act had not been passed, to mention the names of all the members composing any such co-partnership, it shall be sufficient to mention only the name or names of such one or more member or members, or of such agent or agents on behalf of such co-partnership: And every judgment obtained in any such action shall have the same effect and operation upon the property both real and personal of such co-partnership, 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 co-partnership had been actually and in fact a defendant in the action.

(Proviso.)

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 preceding section, the style or firm of the co-partnership 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 co-partnership: And provided also, that no agent sued on behalf of a 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 in person or in property to any judgment obtained in such action.

No. 51. August 22, 1840.

(Where several are sued as Joint Contractors the Verdict may be against some of them only.)

XIX. 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.

(Plea in abatement for non-joinder.)

XX. And be it enacted, That no Plea in Abatement for the non-joinder of any person as a co-defendant shall be allowed in any Action, unless it be stated in the plea that such person is resident within the jurisdiction of the Court, and unless the place of his residence be stated with convenient certainty in an affidavit verifying such plea; and to any such Plea in Abatement the plaintiff may reply, that such person has been discharged by bankruptcy and certificate, or under any Act passed, or to be passed, for the relief of insolvent debtors.

(Provision for subsequent proceedings.)

XXI. And be it enacted, That if, after any such Plea in abatement, the plaintiff shall without proceeding to trial commence another Action against the original defendant or defendants, and the person or persons named in such Plea as a Joint Contractor or Contractors, and if thereafter it shall appear either by the pleadings in such subsequent action, or by the evidence at the trial, that all the original defendants are liable, but that any of the persons named in such plea is or are not liable, and the defendant or defendants not so liable shall accordingly under the provisions of this Act obtain judgment for his or their costs against the plaintiff, the amount of the costs payable to the defendant or defendants so succeeding, shall be allowed to the plaintiff as costs in the cause against such of the defendants, so appearing to be liable, as shall have pleaded in abatement the non-joinder of such person or persons: Provided that any defendant having so pleaded in abatement shall be at liberty at the trial to adduce evidence of the liability of the parties named by him in such Plea.

(Attachment and execution may be pleaded in bar.)

XXII. 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, or a Judge, until the Attachment shall be dissolved, or the proceedings thereupon be otherwise determined; and in such plea it shall be necessary only to state, shortly, that such Writ of Attachment was issued, and to set out the substance of the order finally made thereon, 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.)

XXIII. 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.

(The term "absence.")

XXIV. And be it enacted, That absence from the said Colony, or its Dependencies, 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 its Dependencies, or not.

(The Court may make rules, and award costs and direct trials before a jury.)

XXV. And be it enacted, That it shall be lawful for the Court, or any of the Judges, for the more satisfactory determination of any question of fact arising before such Court or Judge 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 Supreme 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 Judges respectively, 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, 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 adjourn the case or proceedings from time to time, and in all cases to award or refuse Costs, the same to be paid by and to such party or parties as the Court shall in each case think fit to order.

GEORGE GIPPS,
Governor.

Passed the Legislative Council,
this twenty-eighth day of July,
One thousand eight hundred
and forty.

WM. MACPHERSON,
Clerk of Councils.

ANNO QUARTO.
VICTORIÆ REGINÆ.

No. 7.

By His Excellency Sir George Gipps, Knight,
Captain-General and Governor-in-Chief of the
Territory of New South Wales and its De-
pendencies, and Vice-Admiral of the same, with
advice of the Legislative Council.

An Act to empower the Governor of New South
Wales to appoint Commissioners with certain
powers, to examine and report on Claims to
Grants of Land in New Zealand.

WHEREAS in various parts of the Islands
of New Zealand comprehended within
Preamble, the limits of the Territory and Govern-
ment of New South Wales, Tracts or Portions of
Land are claimed to be held by various indi-
viduals, by virtue of purchases or pretended pur-
chases, gifts or pretended gifts, conveyances or
pretended conveyances, or other titles, either
immediately or immediately from the Chiefs or other
individuals of the Aboriginal Tribes inhabiting
the same; and whereas no such individual or
individuals can acquire a Legal Title to or perma-
nent interest in any such Tracts or Portions of
Land, by virtue of any gift, purchase or convey-
ance by or from the Chiefs or other individuals of
such Aboriginal Tribes as aforesaid; and whereas
Her Majesty hath, by instructions under the hand
of one of Her Majesty's Principal Secretaries of
State, dated the fourteenth day of August, One
thousand eight hundred and thirty-nine, declared
Her Royal will and pleasure not to recognize any
Titles to Land in New Zealand which do not
proceed from, or are not, or shall not be allowed,
by Her Majesty; and whereas it is expedient
and proper to put beyond doubt the invalidity of
all Titles to Land within the said Islands of New
Zealand, founded upon such purchases or pre-
tended purchases, gifts or pretended gifts, con-
veyances or pretended conveyances, or other titles
from the said Uncivilized Tribes, or Aboriginal
Inhabitants of New Zealand: Be it therefore de-
clared and enacted by His Excel-
lency the Governor of New South
Wales, with the advice of the Legis-
lative Council of the said Colony,
That all Titles to Land in New Zea-
land which are not, or may not,
hereafter be, allowed by Her Ma-
jesty, are, and shall be, absolutely
null and void.

(Governor may appoint Commissioners to examine
and report on Claims to Grants of Land in New
Zealand.)

II. And whereas Her Majesty hath, in the
said Instructions, been pleased to declare Her
Majesty's gracious intention to recognise claims to
Land which may have been obtained on equitable
terms from the said Chiefs or Aboriginal Inha-
bitants of the said Islands of New Zealand, and
which may not be prejudicial to the present or
prospective interests of such of Her Majesty's
subjects as may resort to, or settle in the said
Islands; and whereas it is expedient and ne-
cessary that, in all cases wherein Lands are
claimed to be held by virtue of any purchase, or
conveyance, or any other title whatsoever from the
said Chiefs, or Tribes, or any Aboriginal inha-
bitant whomsoever of the said Islands, a strict
inquiry be instituted into the mode in which such
Lands have been acquired, and also into the ex-
tent and situation of the same, and also to ascer-
tain all the circumstances upon which such claims
may be founded: Be it therefore enacted, That
it shall and may be lawful for the said Governor
of New South Wales to issue one or more Com-
mission or Commissions, and thereby to appoint
Commissioners who shall have full power and

authority, to hear, examine, and report on, all Claims to Grants of Land in New Zealand; and each of such Commissioners shall, before proceeding to act as such, take and subscribe before one of the Judges of the Supreme Court of New South Wales, or before such person resident in New Zealand as the Chief Justice, for the time being of the said Court shall under his hand and seal nominate and appoint for that purpose, the oath set forth in the Schedule to this Act annexed, marked A; and the Colonial Secretary of New South Wales shall cause the said Oaths, and also the Oath to be taken by the Secretary to the said Commissioners, as hereinafter provided, to be respectively recorded in his Office.

(Governor may appoint Secretary to Commissioners.)

III. And be enacted, That some fit and proper person or persons may from time to time be appointed by the said Governor to perform the duties of Secretary or Secretaries to the said Commissioners, should the said Governor deem the appointment of such Secretary or Secretaries to be necessary; and the said Secretary or Secretaries shall, before exercising any of the duties of his or their office, take and subscribe before one of the Judges of the said Supreme Court, or before such person resident in New Zealand as the Chief Justice for the time being of the said Court, shall under his hand and seal nominate and appoint for that purpose, the oath set forth in the Schedule to this Act annexed, marked B.

(Governor as often as he shall think fit may refer all Claims to Grants of Land to Commissioners.)

IV. And be it enacted, That it shall be lawful for the Governor of the said Colony, as often as to His Excellency shall seem fit, to refer the claims of all persons making application to have Grants of Land within the said Islands of New Zealand executed to them in due form of law, in fulfilment of Her Majesty's gracious intention, to the said Commissioners, to the end, that all such claims may be duly examined and reported upon for the information and guidance of the said Governor: And the said Commissioners, or any two of them, shall proceed to hear, examine, and report on such claims, in manner hereinafter mentioned: Provided always, that nothing herein contained shall authorise the said Commissioners to receive or report upon any claims but such as shall be referred to them by the Governor as aforesaid; and Provided further, that all claims which shall not be preferred in writing to the Colonial Secretary of New South Wales, within six months after the passing of this Act, shall be absolutely null and void, unless it shall be made to appear to the satisfaction of the said Governor, that any claimant or claimants shall not, by reason of absence from the Colony, or other sufficient cause, have been able to prefer his or their claims within the said term of six months, in which case it shall be lawful for the said Governor at any time within a further term of six months, to refer such claim or claims to the said Commissioners, who shall have power and authority to receive and report upon the same, as in other cases.

(Commissioners to be guided by the real justice and good conscience of the case.)

V. And be it enacted, That in hearing and examining all claims to Grants as aforesaid, and reporting on the same, the said Commissioners shall be guided by the real justice and good conscience of the case, without regard to legal forms and solemnities, and shall direct themselves by the best evidence they can procure, or that is laid before them, whether the same be such evidence as the law would require in other cases or not; and that the said Commissioners shall in every case inquire into, and set forth so far as it shall be possible to ascertain the same, the price or valuable consideration, with the sterling value thereof, paid for the lands claimed, to any of the said Chiefs or Tribes, or any Aboriginal inhabitant of New Zealand, as well as the time and manner of payment, and the circumstances under which such payment was made, without taking into consideration the price or valuable consideration which may have been given for the said Lands by any subsequent purchaser, or to any other person or persons, save such Chiefs or Tribes or Aboriginal inhabitant as aforesaid; and shall also inquire into and set forth the number of acres which such payment would have been equivalent to, according to the rates fixed in a schedule marked D, annexed to this Act; and if the said Commissioners, or any two of them, shall be satisfied that the person or persons claiming such Lands or any part thereof, is or are entitled according to the declaration of Her Gracious Majesty as aforesaid, to hold the said Lands, or any part thereof, and to have a Grant thereof made and delivered to such person or persons, under the Great Seal of the said Colony, they, the said Commissioners, shall report the same, and the grounds thereof, to the said Governor accordingly; and shall set forth the situation, measurement, and boundaries by which the said Lands, or portions of Land, shall and may be described in every such Grant, so far as it shall be possible to ascertain the same: Provided, however, that no Grant of Land shall be recommended by the said Commissioners, which shall exceed in extent two thousand five hundred and sixty acres, unless specially authorised thereto by the Governor, with the advice of the Executive Council, or which shall comprehend any Head Land, Promontory, Bay, or Island, that may hereafter be required for any purpose of defence, or for the site of any Town, or for any other purpose of public utility, nor of any Land situate on the Sea shore within one hundred feet of high water mark: Provided also, that nothing herein contained shall be held to oblige the said Governor to make and deliver any such Grant as aforesaid, unless His Excellency shall deem it proper so to do.

(Certain Lands not to be recommended, by Commissioners for Grants.)

VI. Provided, nevertheless, and be it enacted, That the said Commissioners shall not propose to grant to any claimant whomsoever any Land which may, in the opinion of the majority of the said Commissioners, or of the majority of the Commissioners appointed to investigate

the demand of such claimant, be required for the site of any town or village, or for the purposes of defence, or for any other purpose of public utility; nor shall they propose to grant to any individual, any land of a similar character which they may be directed to reserve, either by the Governor of New South Wales, or the Lieutenant-Governor of New Zealand, but that in every case in which land of such description would otherwise form a portion of the Land which the Commissioners would propose to grant to the claimant, they shall in lieu of such Land, propose to grant to him or her, a compensation in other Land of fair average value, at the rate of not less than five, nor more than thirty acres of Land for every acre required to be reserved, either for the site of a village or township, or for the purposes of defence, or for any other purpose of public utility as aforesaid

(Meetings of the Commissioners.)

VII. And be it enacted, That the meetings of the said Commissioners shall be holden in such manner as the said Governor shall from time to time appoint, and the said Commissioners shall proceed with all due dispatch to investigate and report upon the claims referred to them.

(Power of Commissioners to summon Witnesses.)

VIII. And be it enacted, That it shall and may be lawful for the said Commissioners, upon receiving any such claim as aforesaid, to appoint a day, by notice in the *New South Wales Government Gazette*, or in any *Gazette* or *Newspaper* published in New Zealand, for inquiring into such claim, and to issue summonses requiring all such persons as shall therein be named to appear before the said Commissioners at the day and time therein appointed, to give evidence as to all matters and things known to any such person respecting such claim, and to produce in evidence all Deeds, Instruments, or Writings, in the possession or control of any such persons, which they might by law be required and compelled to give evidence of, or to produce in evidence in any cause respecting the like matters depending in the Supreme Court of New South Wales, in so far as the evidence of such persons, and the production of such Deeds, Instruments, and Writings, shall be necessary for the due investigation of such Claim depending before the said Commissioners; and that all such evidence shall be taken down in writing, in presence of the witnesses respectively giving the same, and shall at the time be signed by them, or, in case of their refusing or being unable to sign, by the Secretary to the said Commissioners; and that all such evidence shall be given on oath, which oath it shall and may be lawful for the said Commissioners to administer to every person appearing before them to give evidence; and that any person taking a false oath in any case wherein an oath is required to be taken by this Act, shall be deemed guilty of wilful and corrupt perjury, and being thereof duly convicted, shall be liable to such pains and penalties as by any Law now in force any person convicted of wilful and corrupt perjury is subject and liable to: Provided always, that in all cases in which it may be

necessary to take the evidence of any Aboriginal Native who shall not be competent to take an Oath, it shall be lawful for the said Commissioners to receive in evidence the statement of such Aboriginal Native, subject to such credit as it may be entitled to, from corroborating or other circumstances.

(Witnesses not appearing, or refusing to give evidence.)

IX. And be it enacted, That whenever any person, who being duly summoned to give evidence before the said Commissioners as aforesaid, his or her reasonable expenses having been paid or tendered, and not having any lawful impediment, allowed by the said Commissioners, shall fail to appear at the time and place specified in such summons, or after appearing, shall refuse to be sworn, or to answer any lawful question, or to produce any Deed, Instrument, or Writing, which he or she may lawfully be required to produce, or without leave obtained from the said Commissioners, shall willfully withdraw from further examination without a satisfactory excuse being given to the said Commissioners for such default, or appearing, shall refuse or decline to be examined or give evidence according to law, touching the matter in question, it shall and may be lawful for the said Commissioners, and they are hereby authorised and empowered to issue their warrant for the apprehension of such person, in order that he may be brought before them to give evidence touching such matter as shall be in question, for which he shall have been summoned as aforesaid; and it shall further be lawful for the said Commissioners, if such person shall not shew sufficient cause to the satisfaction of such Commissioners for such default, to commit such person to prison, there to remain without bail or mainprize for any time not exceeding twenty-one days, or in lieu of such imprisonment, to pay such fine, not exceeding one hundred pounds, as the said Commissioners shall impose, which fine shall go towards the expenses incurred in carrying the provisions of this Act into effect.

(Salaries to be paid to the Commissioners and Secretary.)

X. And be it enacted, That the said Commissioners and their Secretary, shall and may receive for their own use, such salaries as the Governor of New South Wales for the time being shall direct and appoint; which Salaries respectively, it shall and may be lawful for the said Governor to order and direct, by Warrant under his Hand, to be paid from and out of the Revenues of New Zealand; and the same shall be the whole of the remuneration of the said Commissioners and Secretary, and every of them respectively, for and in respect of their said Offices.

(Fees to be taken by Secretary to Commissioners.)

XI. And be it enacted, That there shall be paid to the said Commissioners or their Secretary by every person making a Claim to a Grant of Land which shall be referred by the Governor to the said Commissioners for examination as herein-before is provided, the several Fees specified in the Schedule to this Act annexed, marked C; and the said Commissioners or their

Secretary shall duly account for all Fees so paid to them or him as aforesaid, and shall pay the same into the hands of the Colonial Treasurer of New South Wales, or the Treasurer of New Zealand, on the last day of every month, or as soon thereafter as practicable, to be appropriated to the public uses of the said Colony, and in support of the Government thereof. (Saving the Right and Prerogative of Her Majesty.)

XII. Provided always, and be it declared and enacted, That nothing in this Act contained, shall be deemed in any way to affect any right or prerogative of Her Majesty, Her Heirs or Successors.

"GEORGE GIPPS,"

Passed the Legislative Council } Governor.
the fourth day of August, }
One thousand eight hundred }
and forty. }

WILLIAM MACPHERSON,
Clerk of Councils.

SCHEDULES REFERRED TO.

A

COMMISSIONER'S OATH.

I, do solemnly swear, that faithfully, diligently, and impartially, to the best of my ability, I will execute the duties of a Commissioner, appointed under and by virtue of a certain Act of the Governor of New South Wales, with the advice of the Legislative Council of the said Colony, made and passed in the fourth Year of the Reign of Her Majesty Queen Victoria, intituled, "An Act to empower the Governor of New South Wales to appoint Commissioners, with certain powers, to examine and report on Claims to Grants of Land in New Zealand," and that I will not myself directly or indirectly, take or receive, or knowingly permit any other person to take or receive any fee or reward for any thing done or performed under and by virtue of any of the Provisions of the said Act, other than and except such as is authorised by the said Act.

So help me God.

Sworn before, me this } A. B.
day of 184. }

Judge of the Supreme Court of
New South Wales.

B

SECRETARY'S OATH.

I, do solemnly swear, that faithfully, diligently, and impartially, to the best of my ability, I will execute the duties of Secretary to the Commissioners appointed under and by virtue of a certain Act of the Governor of New South Wales, with the advice of the Legislative Council of the said Colony, made and passed in the Fourth year of the Reign of Her Majesty Queen Victoria, intituled, "An Act to empower the Governor of New South

Wales to appoint Commissioners, with certain Powers, to examine and report on Claims to Grants of Land in New Zealand," and that I will not myself, directly, or indirectly take or receive, or knowingly permit any other person to take or receive any fee or reward for any thing done or performed under and by virtue of any of the Provisions of the said Act; and that I will duly account for and pay over to the Colonial Treasurer of New South Wales, or the Treasurer of New Zealand, on the last day of every month, or as soon thereafter as may be practicable, all fees previously received by me, as in the said Act directed.

So help me God.

C. D.

Sworn before, me this }
day of 184. }

Judge of the Supreme Court of
New South Wales.

C

FEES TO BE RECEIVED BY THE
SECRETARY.

	£	s.	d.
For filing any Memorial with the Colonial Secretary, or opposition thereto	5	0	0
For every Summons for Witnesses, each Summons containing two names, by the Party requiring the same.....	0	5	0
For every Witness examined, or Document or Voucher produced in Evidence, by the Party on whose behalf examined or produced.....	0	5	0
For taking down the examination of any Witness	0	5	0
For every one hundred Words after the first hundred, additional.....	0	2	6
For every Certificate granted by Commissioners, of Default, Refusal to answer, or wilful Withdrawing of any Witness	1	0	0
For any Final Report, to be paid by the Party or Parties in whose favor made, when the extent of the Land recommended be not exceeding five hundred Acres.....	5	0	0
For every additional one hundred acres	0	10	0

D

Time when the purchases were made.		Per Acre.		
From	To	s.	d.	s. d.
1st Jan., 1815	31st Dec., 1824	0	6	
" 1825	" 1829	0	6	to 0 8
" 1830	" 1834	0	8	to 1 0
" 1835	" 1836	1	0	to 2 0
" 1837	" 1838	2	0	to 4 0
" 1839	" 1839	4	0	to 8 0

And fifty per Cent. above these rates, for persons not personally resident in New Zealand, or not having a resident Agent on the spot.

Goods, when given to the Natives in Barter for Land, to be estimated at three times their selling price in Sydney at the time.

