



WESTERN AUSTRALIA.

ANNO VICESIMO VICTORIÆ REGINÆ.

No. IX.

An Ordinance to enlarge the remedies of Creditors against the persons of their Debtors.

WHEREAS it is expedient to extend the powers of Creditors ^{Preamble.} to arrest such of their Debtors as shall attempt, by sudden or clandestine departure from the colony of Western Australia, to evade the payment of their just debts; and, in order to facilitate the timely exercise of such powers, to authorise certain public officers, at or near the seaports of the said colony, to issue process for making such arrests: And whereas it is expedient to extend the power of arrest in certain cases of fraud: Be it therefore enacted, by His Excellency the Governor of Western Australia and its Dependencies, by and with the advice and consent of the Legislative Council thereof:—

On affidavit of debt
and belief debtor is
about to abscond,
Resident may issue
process to arrest.

Form of writ.

Copy given to defend-
ant.

Arrest founded on
judgment to be
deemed final pro-
cess.

I. THAT if any professing creditor shall, by the affidavit or affirmation of himself, or of some other competent person, in or to the effect of the form numbered 1 in the Schedule to this Ordinance annexed, satisfy the Resident Magistrate or other Justice of the Peace, at or near any seaport in the said colony (and which said Resident Magistrate or Justice of the Peace respectively is hereby empowered to administer an oath on such affidavit, or to take such affirmation) that any other person is indebted to such creditor upon a judgment recorded in any Court of the said colony to the amount of ten pounds or upwards, or is otherwise indebted to such creditor to the like amount, or that such creditor has a cause of action against any other person for damages sustained to the amount of fifty pounds or upwards, and that there is probable ground for believing that the person so indebted or liable, or that any one or more of several persons jointly so indebted or liable, is about to quit the said colony, unless he, she or they be forthwith apprehended, it shall be lawful for such Resident Magistrate or Justice of the Peace, by a writ or warrant in or to the effect of the form numbered 2 in the said Schedule, to be signed and sealed by him, to direct any constable of the said colony to apprehend the person or persons represented by such affidavit to be about to leave the said colony.

II. THAT a copy of any such writ or warrant, and indorsements thereon, shall, if demanded by or on behalf of the defendant, be delivered to him by the constable executing the same.

III. THAT if any such writ or warrant be issued as aforesaid, or if a capias be issued by the Commissioner of the Civil Court of the said colony under Section 1 of the Civil Court Ordinance 2, William IV., No. 1, on a judgment recovered in any Court of the said Colony, the same shall be deemed and taken to be final process, whether the court in which such judgment be recovered shall or shall not have the power of issuing process of execution against the person; and the defendant, if arrested thereunder, may be lodged and detained in any common gaol in the said colony, until such judgment, together with the costs of arrest, be satisfied, or until such defendant shall be otherwise discharged by due course of law; and such Resident Magistrate or Justice shall forthwith certify, under his hand, to the Registrar Clerk, or other proper officer of the court in which such judgment shall have been

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recovered, the facts of such writ or warrant having been issued, and the result thereof.

IV. THAT if any such writ or warrant be issued by any Resident Magistrate or Justice of the Peace as aforesaid, on a debt or claim not then prosecuted to final judgment, the person arrested thereunder may obtain his discharge by any one of the following modes:—

Modes by which debtor may obtain discharge.

1. (When the defendant submits to the Plaintiff's claim)—By depositing in the hands of the Resident Magistrate or Justice issuing such writ or warrant the debt or damages sworn to, and (if no suit or action shall have been commenced for the recovery of such debt or damages previous to the issue of such writ or warrant) the costs of arrest; but if any such suit or action shall have been so commenced, then by depositing as aforesaid, over and above the amount of debt or damages, the sum of Twenty pounds to answer the Plaintiff's costs; the justice receiving any such deposit shall, as soon as reasonably may be, pay or cause to be paid to the plaintiff, or his authorised agent, the sum so received as debt or damages, and if there be no deposit for general costs, the costs of arrest; but, if there be such last-mentioned deposit, shall in like manner pay to the Plaintiff, or his agent, so much thereof as shall cover the amount of Plaintiff's costs, untaxed if assented to by defendant, or in case of dispute, as taxed by the proper officer of the Court in which such suit or action shall be pending; and the said Resident Magistrate or Justice shall forthwith, in case the Plaintiff's claim for costs be assented to by the defendant, or, otherwise on being served with a certificate signed by such proper officer certifying the taxed amount of such costs, pay over the balance, if any, of the said sum of Twenty pounds to the defendant or his authorised agent. By deposit of claim.
2. (When the defendant intends to resist the Plaintiff's claim)—By depositing in the hands of the Resident Magistrate or Justice issuing such writ or warrant, the amount of debt or damages sworn to, and the sum of Twenty pounds, to answer the Plaintiff's costs, and a further sum, reckoned at the rate of sixpence for every pound of the aggregate amount of the By deposit of security for debt and costs.

said deposit for debt or damages and costs ; such poundage to be reserved by such Resident Magistrate or Justice for his own proper use and benefit, for and in consideration of his safe custody of the said deposits ; and such Resident Magistrate or Justice shall pay over and dispose of the said deposits according to the order of any Court in which a suit or action for the recovery of such debt or damages shall be pending at the time of such deposit, or shall be thereafter instituted.

Bail bond ; two sureties.

3. By obtaining two respectable householders as sureties, to enter with the defendant himself into a bond to the plaintiff in or to the effect of the form numbered 3 in the said schedule, in double the amount of the debt or damages sworn to, if such debt or damages do not exceed fifty pounds ; and if the same shall exceed fifty pounds, then the penal sum of such bond shall be the sworn amount of debt or damages, together with fifty pounds in addition thereto ; and the condition of such bond shall be, that, if final judgment in any suit or action then or thereafter to be commenced for the recovery of the said debt or damages shall be for the Plaintiff, the defendant shall satisfy such judgment, or render himself to prison ; or that, if the defendant shall fail to make such satisfaction or render the said sureties, or one of them, shall satisfy the judgment for him, or render him to prison. Every such bond shall be executed in the presence of the Resident Magistrate or Justice of the Peace who issued the writ of arrest, or, in case of his death or absence, in the presence of any other Justice of the Peace, who respectively may, at his discretion, require any person proposing to be such surety as aforesaid, to make affidavit (to be sworn before such Resident Magistrate or Justice) that he or she has property within the said colony, independently of all his or her existing debts, worth double the amount for which he or she proposes to become bound ; and every such bond and surety's affidavit, if any, shall be by such Resident Magistrate or Justice transmitted, as soon as reasonably may be, to the Court in which such suit or action shall be instituted ; and if judgment shall be for defendant, or the plaintiff be nonsuited or discontinue suit, such bond shall be cancelled and delivered to the defendant,

or to either of his sureties; but if judgment be for the plaintiff, such bond shall, without any order of court for that purpose, be handed over to the plaintiff or his agent, on application for the same.

V. THAT from and after the passing of this Ordinance, any defendant arrested under a writ or warrant, issued by the Commissioner of the said Civil Court in pursuance of the Civil Court Ordinance 2nd William IV., No. 1, upon any claim not prosecuted to final judgment, may obtain his discharge, not according to the 17th Rule of the now existing Rules and Orders of the said Court, but by delivering to the Sheriff or his deputy any such deposit as aforesaid for satisfying the plaintiff's claim, or for securing debt, damages, or costs and poundage, or by executing in the presence of the Sheriff or his deputy a bond in such form and with such condition, with power to the Sheriff or his deputy to require a like affidavit from any proposing surety as is hereinbefore provided with respect to arrests, under a writ or warrant issued by a Resident Magistrate, or other Justice of the Peace; and the Sheriff or his deputy shall deal with any such deposit or bond in like manner as a Resident Magistrate or other Justice of the Peace receiving or taking a like deposit or bond is hereinbefore directed to deal with the same.

How debtors arrested on mesne process to obtain discharge.

VI. THAT it shall be lawful for any person arrested under the provisions of this Ordinance, on the ground that he is about to quit the colony or otherwise, to apply on affidavit to the Commissioner of the said Civil Court for an order or rule on the plaintiff, to shew cause why the person so arrested should not be discharged out of custody, on the ground that such arrest was illegal, vexatious or oppressive; and that it shall be lawful for such Commissioner 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 Commissioner shall seem fit.

Civil Court may be moved for discharge of debtor.

VII. THAT if the defendant do not obtain his discharge by any of the methods aforesaid, within twenty-four hours next after his arrest (during which period it shall be lawful for the arresting officer, if so requested by the defendant, to keep the defendant in custody elsewhere than in gaol) he may be lodged in custody in

Debtor not obtaining discharge to be lodged in gaol.

any common gaol at or nearest to the place of arrest. But such defendant may procure his summary removal to any common gaol at Perth or elsewhere by depositing in the hands of any neighbouring Justice of the Peace such sum as such Justice may deem requisite to cover the costs and charges of securely effecting such removal; and thereupon such Justice shall, and he is hereby empowered to issue an order under his hand to the gaoler in whose custody the defendant shall then be, directing the delivery by such gaoler of such defendant to any constable named in such order, which shall be a sufficient warrant and indemnity to any gaoler acting in obedience thereto, and taking a receipt from such constable for the body of such defendant; and such justice shall at the time of issuing any such order as last aforesaid deliver to the constable named in such order, a warrant directing him to receive into his custody the body of such defendant, and him safely to convey to, and lodge in, any gaol therein appointed, and directing the keeper of such last-mentioned gaol to receive and keep in his custody the defendant until discharged by due course of law; and such warrant shall be a sufficient indemnity to any constable or gaoler acting in obedience thereto.

Bill of particulars to
be served, and plaint
entered.

VIII. THAT if any person be arrested under a writ or warrant issued by any Resident Magistrate or other Justice of the Peace as aforesaid, and no suit or action touching the subject matter of arrest shall be pending previous to such writ or warrant, the plaintiff or his agent shall cause to be served on the defendant at the time of arrest, or within twenty-four hours thereafter, a bill of particulars of the plaintiff's demand, and shall also cause a plaint to be entered in the office of the said Civil Court (if the subject matter of the suit be exclusively within the jurisdiction of the said Civil Court) within the period of time next hereinafter mentioned, that is to say, within forty-eight hours, exclusive of Sundays and holidays, after arrest, if made within twenty miles of Perth, and if made elsewhere, then within such time after arrest as shall be equivalent to an allowance of twenty-four hours for every ten miles of distance of the place of arrest from Perth. If there shall be at the place of arrest, or at the place in which the defendant shall be lodged in gaol after arrest, a court of competent jurisdiction to hear and determine the subject matter of the plaintiff's claim, then the plaintiff or his agent shall within forty-eight hours after the defendant shall be so arrested, make or enter his plaint, com-

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plaint, or information in such court according to the usual course of proceeding of such court; otherwise it shall be lawful for any Resident Magistrate or Justice of the Peace to discharge such defendant from custody.

IX. THAT the Commissioner of the said Civil Court, and the Commissioner of every Court of Requests in the said Colony, and every Bench of Magistrates therein empowered to determine suits for the recovery of small debts, shall respectively, as soon as reasonably may be after this Ordinance shall come into operation, establish rules for the further conduct and prosecution of suits or actions after entry of plaint against defendants in custody, under the provisions of this Ordinance; and may from time to time rescind, alter or add to such rules.

Rules to be made for conduct of suits against persons in custody.

X. THAT no arrest under or by way of final process of any judgment debtor, on the ground that he is about to leave the colony, shall be deemed irregular or void, notwithstanding that the judgment in respect of which such arrest was made ought by law to have been revived previous to such arrest, provided that such judgment shall have been recovered or confessed within six years next preceding such arrest, and that such arrest shall be made at the instance of the plaintiff.

Arrest may be founded on unrevived judgment.

XI. THAT no defendant arrested under the foregoing provisions, or whose arrest shall appear to the said Civil Court to have been *bond fide* intended to be in conformity with such provisions, shall be discharged from such arrest, by reason of any defect in form or substance in any warrant, order or other document issued by any Justice of the Peace relating to such arrest or subsequent proceedings thereunder, or in any bail bond, or by reason of any irregularity in the making of such arrest, or in any proceeding subsequent thereto on the part of any constable or gaoler; unless it shall be made to appear to the satisfaction of the said Civil Court, that there are reasonable grounds for believing that such defect or irregularity was wilful and induced by corrupt, malicious or oppressive motives; nor shall any Justice of the Peace, constable or gaoler be answerable, pecuniarily or otherwise, for any such defect or irregularity, unless it shall be averred and proved in any action, suit, or other proceeding against

No defendant to be discharged from arrest on ground of defect or irregularity not imputable to corruption or malice.

such justice, constable or gaoler, that such defect or irregularity was wilful and induced by corrupt, malicious, or oppressive motives.

Plaintiff in certain cases may issue execution against person of debtor on application to commissioner.

XII. THAT it shall be lawful for the plaintiff, who shall have obtained a judgment or decree against a defendant in the said Civil Court, to apply to the Commissioner thereof for a warrant to arrest the defendant in such action or suit; provided that such plaintiff shall, by the affidavit of himself or some other person or persons, show to the satisfaction of the said Commissioner, that the defendant is about to remove any of his property out of the jurisdiction of the said Civil Court, with intent to defraud his creditor or creditors, or that defendant has property or rights in action, which he fraudulently conceals, or that he has right in action or some interest in any public stock money, or evidences of debt, which he unjustly refuses to apply to the payment of any just judgment or decree which shall have been recorded or pronounced against him, or that he has any other means whereby (in the opinion of such Commissioner) he can pay the same, and refuses to do so, or that he has assigned, removed or disposed of, or is about to dispose of, any of his property with intent to defraud his creditor or creditors, or that he fraudulently contracted the debt or incurred the obligation respecting which such suit is brought, and that such judgment or decree will be defeated unless such defendant be apprehended; in any of such cases it shall be lawful for such Commissioner to authorise the arrest of such defendant by the ordinary writ of *capias ad satisfaciendum* (in such form as the said Commissioner shall direct and appoint under his hand), the same to be by such Commissioner signed and directed to the Sheriff of Western Australia and his deputies; and such writ, so issued and signed, shall be held to be full and sufficient authority to such Sheriff and his deputies in that behalf to apprehend and detain in custody the person or persons therein named until he or they shall be dealt with according to law.

Person arrested may apply to commissioner for discharge.

XIII. THAT it shall be lawful for any person so arrested to apply on affidavit, at any time after such arrest, to the said Civil Court for an order or rule on the plaintiff in any such action or suit, to show cause why the defendant should not be discharged out of custody; and it shall be lawful for such Civil 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 order therein as to such Civil Court shall seem fit.

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XIV. THAT the undermentioned fees shall or may be lawfully demanded and received for and in respect of the undermentioned services, process, or acts, rendered, done, or issued under this Ordinance, (that is to say)—

By a Resident Magistrate or Justice of the Peace.

	£	s.	d.
For taking affidavit or affirmation of debt,	0	1	0
For drawing same when required,	0	2	0
For issuing warrant or warrant or arrest,	0	2	6
And for copy thereof for service on defendant, ..	0	1	0
For preparing and attesting execution of bail bond, ..	0	7	6
For taking affidavit of surety,	0	1	0
For drawing same when required,	0	1	0
For receipt of deposit money,	0	1	0

By a Constable.

For making arrest within one mile of constable's residence,	0	5	0
For every additional mile one way,	0	1	0
For making arrest on board a ship or vessel, ..	0	10	6
Actual expenses out of pocket for boat hire and assistance			
For conveying prisoner to gaol, or from one gaol to another, same allowance as for conveyance of prisoners on criminal charges.			

XV. THAT this Ordinance shall not come into operation until it shall have received the Royal confirmation, nor until such confirmation shall have been notified by the Governor for the time being by proclamation or other public notice. Suspended clause.

A. E. KENNEDY,
GOVERNOR AND COMMANDER-IN-CHIEF.

Passed the Legislative Council }
this 6th day of November, 1856. }

HENRY WAKEFORD,
Clerk of the Council.

SCHEDULE.

No. I.

FORM OF AFFIDAVIT TO GROUND THE ISSUE BY A RESIDENT
MAGISTRATE OR JUSTICE OF THE PEACE OF A WRIT OF ARREST.

(For an Ordinary Debt.)

Western Australia }
to wit. }

A. B., of , maketh oath and saith (or, "being one of the people called Quakers," solemnly affirms) that C. D., of , is justly indebted to this deponent (or, affirmant) in the sum of , for goods sold and delivered by this deponent (or, affirmant) to the said C. D., at his request (or otherwise, as the case may be, state the cause of action clearly), and that this deponent (or, affirmant) has been informed and verily believes that the said C. D. has engaged his passage for parts beyond seas, on board the ship or vessel which is publicly announced as about to sail from the port of , in a few days (or, as the case may be, state deponent's grounds for believing that the debtor intends to leave the colony), and this deponent further saith that for the reason aforesaid, he verily believes that the said C. D. is about to quit the colony in a few days, unless he be forthwith apprehended.

(Signed) A. B.

Sworn (or, affirmed) before me, at }
in the said colony, }
the day of }

E. F.,

Resident Magistrate at (or, for) the port of
(Or, a Justice of the Peace residing at or near the port of)

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(FOR DAMAGES)

Western Australia }
to wit.

A. B., of , maketh oath and saith, that on or about the day of last, C. D., of , did unlawfully and violently assault and beat this deponent at in the said colony, by reason of which assault this deponent has been damnified to the amount of (or, as the case may be); and this deponent further saith that he has been informed and verily believes that since the commission of the said assault the said C. D. has declared that he will, by forthwith quitting this colony, deprive this deponent of means of redress for the said assault (or, according to the actual ground of belief that the wrong-doer means to quit the colony); and this deponent also saith that for the reason aforesaid he verily believes that, unless the said C. D. be forthwith apprehended, he, this deponent, will be deprived of the opportunity of obtaining legal redress against the said C. D. for the wrong aforesaid.

(Signed) A. B.

Sworn, &c., (as in the preceding form.)

No. II.

WRIT OF ARREST.

Western Australia }
to wit.

To E. F., a constable in and for the said colony.

Whereas A. B., of has made oath (or, affirmation) before me that C. D. of is justly and truly indebted to him in the sum of for goods sold and delivered to him the said C. D. (or, otherwise, according to the nature of the debt; and in case of a claim for damages, that he has been damnified to the amount of by reason of assault and battery committed on him by C. D., of or, as the facts may warrant); and whereas A. B. has shown to my satisfaction sufficient ground for believing that the said C. D. is about to quit this Colony unless he be forthwith apprehended: Now, therefore, by virtue of the Ordinance 20th Victoria, No. 9, "to enlarge the remedies of creditors against the persons of their debtors," I command you that

you take the said C. D., if he shall be still found in this colony, and him safely keep until he shall have given me bail or deposit according to law, or until the said C. D. shall be by other lawful means discharged from your custody, and I further command that on execution hereof you do deliver to the said C. D. a copy of this writ, and certify to me the manner and time of execution hereof.

Given under my hand and seal the
day of

G. H. [Seal.]

Resident Magistrate at (or, for) the Port of
(or, a Justice of the Peace residing at or
near the Port of)

No. III.

BAIL BOND.

Know all men by these presents, that we, C. D., (*defendant*), of
E. F., (*surety*), of

and G. H., (*other surety*), of are held and
firmly bound to A. B., (*plaintiff*), of in
the sum of *(double the amount of debt
or damages sworn to, if not exceeding fifty pounds; if exceeding
that sum, then fifty pounds in addition to the sum sworn to)*, of
lawful money of the said colony, to be paid to the said A. B., his
certain attorney, executors, administrators, or assigns; for which
payment, to be well and truly made, we bind ourselves and each of
us for himself in the whole, our and every of our heirs, executors
and administrators, firmly by these presents. Sealed with our
seals, dated the day of

The condition of the above written obligation is such that if final
judgment shall be for the said A. B. in a suit or action by him
against the said C. D. for the recovery of a sum of for
goods sold and delivered (*or as the case may be*), then and in such
case the above bounden C. D. shall immediately satisfy such judg-
ment, or render himself to prison, or in default thereof res-
pectively the above bounden E. F. and G. H., or one of them,
shall satisfy such judgment, or render the said C. D. to prison.

Sealed and delivered in the }
presence of

C. D. [Seal]
E. F. [Seal]
G. H. [Seal]