

No. XI.

DISTRESS AND
REPLEVIN.

An Act to regulate Distresses for Rent and Replevins. [19th December, 1851.]

Preamble.

No landlord to dis-
train except
personally or by
bailiff authorized by
written warrant.

Bailiff to procure
warrant in duplicate
and give one copy to
person distrained on.

Person distraining
to forthwith make
out and deliver
inventory.

WHEREAS doubts exist whether it is lawful in this Colony to sell any goods or chattels distrained for rent and it is expedient to remove such doubts and to regulate the manner of making such distress and sale in future as well as the mode of commencing and conducting actions of replevin in cases of distress for rent Be it therefore enacted by His Excellency the Governor of New South Wales with the advice and consent of the Legislative Council thereof That no person to whom any rent shall be due shall distrain any goods or chattels for such rent except by himself personally or by his agent or bailiff then duly authorized by warrant under his hand or under the hand of his Attorney duly constituted such warrant to be in the form or to the effect of the Schedule hereunto annexed and marked with the letter A Provided always that whenever the person signing such warrant shall be unable to write his name his signature shall be attested by a Justice of the Peace an Attorney at Law or a Clerk of Petty Sessions.

2. And be it enacted That every person making any such distress as the agent or bailiff of another shall first procure from such person two copies of the before mentioned warrant both of which shall be signed as aforesaid and shall deliver one of such copies at the time of making the distress to the tenant or owner of the goods distrained or to some person for him resident at the place where the said distress shall be made and in case there shall be no person at such place with whom such copy can be left as aforesaid then such bailiff or agent shall give such copy to the said tenant or owner at any time afterwards on demand within one month after the making of such distress.

3. And be it enacted That every person making any distress for rent shall forthwith make out a written inventory in the form or to the effect of the Schedule hereunto annexed and marked with the letter B of the goods distrained which inventory shall be dated on the day of such distress and shall be signed by the person making the same and shall be thereupon delivered to the tenant or owner of the goods so distrained or to some person for him resident at the place where the said distress shall be made and in case there shall be no person at such place with whom such inventory can be left as aforesaid then such inventory shall be posted on some conspicuous part of the premises on which the distress is made and such person so distraining shall give such inventory to the said tenant or owner at any time afterwards on demand within one month after the making of such distress.

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4. And be it enacted That where any goods or chattels shall be distrained for any rent and the tenant or owner of the goods so distrained shall not within five days next after such distress taken replevy the same with sufficient security to be given to the Sheriff or his Deputy or to any Justice of the Peace according to law then in such case after the expiration of the said five days the person distraining shall and may cause the goods and chattels so distrained to be sold by public auction by a duly licensed auctioneer or by a Sheriff's bailiff or a bailiff of some Court of Petty Sessions or Court of Requests for the best price that can be gotten for the same towards satisfaction of the said rent and the charges of the said distress and sale and the overplus if any shall be forthwith handed over to the said tenant or owner and a full and true account in writing of every such sale shall in every case be given by the person making the distress to the tenant or owner on demand Provided always that nothing herein contained as to the time of sale shall apply to any corn grass hops roots fruits pulse or other product whatsoever which shall be growing at the time of the same being seized as a distress.

Goods distrained for
rent may be sold
after the expiration
of five days.

5. And be it enacted That the tenant or owner of any goods so distrained as aforesaid may at his option direct and specify the order in which the said goods and chattels shall be successively sold and the said goods and chattels shall in such case be put up for sale according to such directions of the tenant or owner as aforesaid.

Not to apply to
corn grass hops &c.
growing at time of
seizure.

6. Provided always and be it enacted That no distress shall be made on the goods of any casual visitor in any house nor on the goods (other than furniture) of any lodger in any house or apartment ordinarily let or used as a lodging house or apartment.

Owner of distrained
goods may direct
order of sale.

goods not to be
seized for rent.

7. And be it enacted That the Sheriff for the time being of the said Colony shall by writing under his hand and seal appoint one or more Deputy or Deputies in each of the towns of Parramatta Maitland Goulburn Bathurst Windsor and Brisbane for the purpose of making replevin and deliverance of distresses.

Sheriff to appoint
Deputies at certain
places.

8. And be it enacted That in all cases in which any distress shall be made at any place distant more than ten miles from the office of the Sheriff or from the residence of any Deputy appointed as aforesaid it shall be lawful for any Justice of the Peace to grant a replevin of the goods distrained and for that purpose to take a replevin bond with sufficient sureties Provided nevertheless that neither such Justice nor the Sheriff nor any such Deputy as aforesaid shall be liable to any action for taking insufficient security if he shall have acted *bona fide* and with reasonable care and caution.

Justices may grant
replevin in certain
cases.

9. And be it enacted That the said Sheriff or Deputy or Justice of the Peace as aforesaid shall before deliverance be made by him of any distresses take from the person or persons to whom such replevin is granted and two sufficient sureties a bond in double the value of the property distrained such value to be ascertained by the oath of one or more credible witness or witnesses and which oath the person granting replevin is hereby authorized to administer conditioned for commencing within one calendar month from the date of such bond and prosecuting with effect and without delay an action for the taking and detaining the property distrained and for returning such property in case a return should be awarded and such Sheriff Deputy or Justice of the Peace taking any such bond shall at the request of the avowant or person making cognizance assign such bond to the avowant or person making cognizance by indorsing the same and attesting it under his hand and seal in the presence of one credible witness and if the bond so taken and assigned be forfeited the avowant or the person making cognizance may bring an action and recover thereupon in his own name and the Court where such action shall be brought

Sheriff before de-
liverance of any
distress to take suffi-
cient security as
herein mentioned.

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brought may by a rule of the same Court give such relief to the parties upon such bond as may be agreeable to justice and reason and such rule shall have the nature and effect of a defeasance to such bond.

Actions of replevin
to be commenced by
writ of summons in
such form as the
Judges shall pre-
scribe.

10. And be it enacted That every action of replevin except those over which jurisdiction is hereinafter given to Courts of Requests and Courts of Petty Sessions shall be commenced in the Supreme Court of New South Wales by writ of summons in such form as the Judges shall from time to time prescribe and be thenceforward prosecuted and dealt with in like manner as other actions in the said Court may be prosecuted and dealt with and the Laws and Statutes in force in England applicable to actions of replevin shall be in force in this Colony and be applied in the Administration of Justice so far as the same can be applied within this Colony.

Forms of precept to
replevy
and of replevin and
assignment bonds.

10. And be it enacted That every precept to replevy shall be in the form or to the effect of the Schedule to this Act annexed marked D and every replevin bond shall be taken in the form or to the effect of the Schedule to this Act annexed marked E and every assignment of such bond shall be in the form or to the effect of the Schedule to this Act annexed marked F.

Fees to be charged.

12. And be it enacted That the Sheriff and every such Deputy as aforesaid and every Justice of the Peace shall be entitled to demand and receive for the making of every replevin including the taking of the bond thereon a fee of ten shillings and for the making of every such assignment a fee of two shillings and sixpence.

Courts of Requests
and Petty Sessions
empowered to adjudicate
in actions of
replevin as to dis-
tresses for rent not
exceeding thirty
pounds.

13. And be it enacted That the respective Courts of Requests established or hereafter to be established in the County of Cumberland and the respective Courts of Petty Sessions established or hereafter to be established in any part of the Colony other than the County of Cumberland shall and they are hereby authorized and empowered to hear and determine within their respective jurisdictions all actions of replevin relating to distresses for rent between landlord and tenant where the rent for or in respect of which any distress shall be or ought to have been made shall not exceed thirty pounds in amount or value and all proceedings in such actions of replevin shall be taken and all such actions shall be tried and determined in the same manner and shall be subject to the same rules as the law now directs or shall hereafter direct with respect to other actions in the said Courts of Requests or Petty Sessions.

As to form of plaint
in such actions.

14. And be it enacted That the plaint in actions of replevin in the said Courts of Requests or Petty Sessions shall be in the form or to the effect of the Schedule to this Act annexed marked G.

Court may award
damages or may
order replevin bond
to be given up.

15. And be it enacted That if at the hearing of any such action of replevin before any of the said Courts of Requests or Petty Sessions it shall appear that any sum was due for rent and that no tender of the sum so due was made before the filing of the plaint in the said Court it shall be lawful for such Court to give judgment for the defendant for the sum ascertained to be due for rent and the costs of defending the action and making the distress and in case it shall appear that no rent was due at the time of such distress or that a tender was made of the amount due and the costs of distress previous to the filing of the plaint it shall be lawful for such Court to direct the replevin bond to be delivered up to the party complaining of the distress and also to give judgment for the plaintiff for such damages as the Court may think fit and if necessary to direct that such damages and costs shall be set off against or deducted from any rent then due or thereafter to accrue due and to make an order accordingly.

Court may order
goods distrained on
to be sold.

16. And be it enacted That it shall be lawful for every such Court of Requests or Petty Sessions on the hearing of any such action of

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of replevin to order that the goods distrained shall be returned to the party who distrained the same and in every such case where the goods distrained shall be actually returned to the party who distrained the same and the costs of the proceedings paid no further proceedings shall be had on the replevin bond and all such goods if returned or recovered under any such order as aforesaid may be sold for the recovery of the rent due and expenses at the expiration of four days after the return thereof.

17. And be it enacted That where any distress shall be made by the person to whom the rent shall be due or by any bailiff or agent as aforesaid the charges in the Schedule hereunto annexed and marked with the letter C and no other shall be made in respect thereof.

18. And be it enacted That it shall be lawful for any person lawfully taking any distress for rent to impound or otherwise secure the distress so made of what nature or kind soever it may be in such places or on such part of the premises chargeable with the rent as shall be most fit and convenient for the impounding and securing such distress and to sell and dispose of the same upon the premises and it shall be lawful for any person or persons whatsoever after the expiration of the five days hereinbefore mentioned to come and go to and from such place or part of the said premises where any distress for rent shall be impounded and secured as aforesaid in order to view and buy and in order to carry off or remove the same on account of the purchaser thereof and if any pound breach or rescous shall be made of any goods or chattels distrained for rent the person or persons grieved thereby shall in a special action on the case for the wrong thereby sustained recover his and their treble damages and costs of suit against the offender or offenders in any such rescous or pound breach any or either of them or against the owner of the goods distrained in case the same be afterwards found to have come to his use or possession.

19. And be it enacted That in case any such distress and sale as aforesaid shall be made by virtue or colour of this Act for rent pretended to be arrear and due where in truth no rent is arrear or due to the person distraining or to him in whose name or right such distress shall be taken as aforesaid then the owner of such goods or chattels distrained and sold as aforesaid his executors or administrators shall and may by action of trespass or upon the case to be brought against the person so distraining his executors or administrators recover double of the value of the goods or chattels so distrained and sold together with full costs of suit.

20. And be it enacted That in no case of distress for rent shall any appraisement whatever be necessary nor shall any costs or expenses be charged or allowed in respect thereof.

21. And be it enacted That no action shall be brought nor any damages recovered in any Court of Justice in this Colony against any person for having at the time of the passing of this Act remained in possession of any goods or chattels lawfully distrained for rent on the premises in respect of which such distress may have been made during five days after the making of such distress or for having at the time of the passing of this Act sold and disposed of after the expiration of such five days any goods lawfully distrained for rent Provided that nothing herein contained shall be held to apply to any action already commenced at the time of the passing of this Act.

22. And be it enacted That if any person shall knowingly and wilfully strain for rent as the agent or bailiff of another without having first obtained the warrant hereinbefore mentioned in duplicate or shall neglect or refuse to deliver one of such duplicates to the tenant or owner as hereinbefore directed or if any person distraining for rent shall neglect or refuse to make out and deliver or post up such inventory

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inventory as aforesaid or shall charge more for any distress or sale than is authorized by this Act or shall refuse to give such account in writing of any sale as hereinbefore provided every person so offending shall on conviction be liable to a penalty not exceeding fifty pounds to be recovered in a summary way by the party aggrieved before any two Justices of the Peace.

Application of penalties.

23. And be it enacted That all penalties imposed by this Act shall be paid one moiety to Her Majesty Her Heirs and Successors for the public uses of the said Colony and in the support of the Government thereof and shall be applied in such manner as may be from time to time directed by any Acts of the said Governor and Legislative Council and the other moiety to the use of the informer or party prosecuting.

Interpretation clause.

24. And be it enacted That for the purposes of this Act the word "rent" shall be held to mean any rent reserved upon any demise lease or contract whatsoever.

SCHEDULE A.*Warrant to Distain.*

I A. B. of do hereby authorize you C. D. to distrain the goods and chattels in the dwelling-house [or in and upon the farm land and premises] of E. F. situate at for £ being the amount of rent due to me for the same on the day of last [or instant] and to proceed thereon for the recovery of the said rent as the law directs.

Dated this day of A. D. 18
A. B.
[or A. B. by his Attorney G. H.]

SCHEDULE B.*Inventory.*

I HAVE this day [if distress made by a bailiff here add by virtue of the warrant a copy of which is hereunder written] distrained the following goods and chattels in the dwelling-house [or in and upon the farm land and premises] of E. F. situate at for £ being the amount of rent due to me [or if the distress be made by a bailiff to A. B. of] for the same on the day of last [or instant].

Dated this day of A. D. 18
A. B. Landlord.
[or C. D. Bailiff.]

[And if distress made by a bailiff enumerate the goods and chattels at full length then insert a copy of the warrant to distrain.]

SCHEDULE C.*Charges of Distress.*

		£ s. d.
Costs of levy where made by an agent or bailiff under the authority of a warrant to distrain according to the following scale—		
Where the sum distrained for shall be more than two and less than ten pounds	0 5 0
Where such sum shall be ten and less than fifty pounds	0 10 0
Where such sum shall be fifty pounds or upwards	1 0 0
Man in possession per diem	0 4 0
Charges of auctioneer or bailiff conducting sale not exceeding 2½ per cent.		
Advertisements—the money paid for their insertion if such advertisements be required by the person whose goods are distrained.		

SCHEDULE

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SCHEDULE D.

Precept to Replevy.

A. B. Esquire Sheriff [or Deputy specially appointed by the Sheriff or one of Her Majesty's Justices assigned to keep the Peace] to C. D. my bailiff—Because E. F. hath found me sufficient security as well for prosecuting his suit with effect against G. H. for taking his goods and chattels to wit [*specifying them*] and also for making a return thereof if return thereof shall be adjudged therefore I command you without delay to replevy and deliver to the said E. F. his said goods and chattels which the said G. H. hath taken and unjustly detained as alleged Thercof fail not.

SCHEDULE E.

Replevin Bond.

KNOW all men by these presents that we J. P. of [place of abode and addition] C. D. of [place of abode and addition] and L. H. of [place of abode and addition] are held and firmly bound to A. B. Esquire Sheriff of New South Wales [or Deputy specially appointed by the Sheriff or one of Her Majesty's Justices assigned to keep the Peace] in the sum of [insert double the value of the goods and chattels] of lawful money of Great Britain to be paid to the said A. B. or his certain attorney executors administrators or assigns for which payment to be made we bind ourselves and each of us our respective heirs executors and administrators jointly and severally firmly by these presents.

Dated this _____ day of _____ A.D. 18____

WHEREAS the above A. B. upon the complaint of the above J. P. hath consented to deliver and replevy to the said J. P. the goods and chattels following to wit [enumerate the whole of the property] which J. N. of [place of abode and addition] hath taken and wrongfully withheld as the said J. P. alleges.

Now the condition of this obligation is that if the said J. P. do within one month now next ensuing commence an action against the said J. N. in the Supreme Court of New South Wales or in some competent Court of Requests or of Petty Sessions and do prosecute such suit with effect and without delay against the said J. N. for the taking and withholding of the said goods and chattels and also do make return thereof if return thereof shall be adjudged by law and so defend and save harmless the said A. B. against the said J. N. and all other persons from and against all matters and things concerning the premises then this obligation shall be void otherwise it is to remain in full force.

Signed sealed and delivered }
in the presence of } J. P. (L.S.)
C. D. (L.S.)
L. H. (L.S.)

SCHEDULE F.

Assignment of Bond.

KNOW all men by these presents that I the within named A. B. have at the request of the within named J. N. [*the avowant or person making cognizance*] assigned over this replevin bond unto him the said J. N. pursuant to the Act in such case made and provided. In witness whereof I have hereunto set my hand and seal this day of 18 .

Signed sealed and delivered }
in the presence of } A. B. (L.S.)

SCHEDULE G.

Plaint.

A. B. of [insert place of residence] complains of **C. D.** of [insert place of residence] for that the said **C. D.** did on the _____ day of _____ last [or instant] at [insert place of distress] unlawfully distrain the following goods and chattels of the said **A. B.** that is to say [here describe them at full length] for the sum of [here insert amount distrained for] which he the said **C. D.** alleged to be due to him for rent.