

Absent Debtors.

No. V.

AN ACT to render the Property in New Zealand of Debtors absent from the Colony available for the Payment of their Debts. [28th May, 1858.]

ABSENT DEBTORS.

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

1. An action in the usual form may be commenced in the Supreme Court of New Zealand against any defendant who is not within the Colony, and the plaintiff may proceed in such action by process of foreign attachment in manner hereinafter provided.

Action may be commenced against defendant not within Colony, and the plaintiff may proceed by foreign attachment.

2. Before issuing a writ of foreign attachment, the plaintiff shall file in the Supreme Court, instead of serving it on the defendant, a copy of the writ in the action with the declaration annexed, and shall also file an affidavit verifying the matters contained in the declaration, and stating that the cause of action arose in respect of a breach of contract made or to be wholly or in part performed in the Colony of New Zealand, and that the defendant is not, to the best of the plaintiff's belief, within the said Colony.

Writ and declaration and affidavit to be filed before writ of foreign attachment issued.

3. Provided always that if it shall at any time appear that the defendant was within the jurisdiction of the Court at the time of issuing the writ, the said writ and all proceedings thereupon shall be set aside on application to the Supreme Court or a Judge thereof, with such costs, to be paid by the plaintiff to such person and in such manner, as the said Court or Judge shall direct. And in case it shall at any time appear that the cause of action did not arise in respect of a breach of contract made or to be wholly or in part performed in the said Colony, the attachment shall be forthwith dissolved by order of the Court or any Judge thereof, with costs to be paid by the plaintiff to such parties and in such manner as such Court or Judge shall direct.

If defendant in the Colony when writ issued same and all proceeding to be set aside, and if cause of action did not arise in the Colony attachment to be dissolved.

4. Upon filing such writ and declaration and affidavit as aforesaid, a writ of foreign attachment shall be issued at the plaintiff's instance, and shall be served upon the several garnishees or persons therein named, in whose hands it is intended thereby to attach any real or personal property, by delivering a copy thereof to each such garnishee or other person personally or by leaving the same at his last usual place of abode. And if the said writ of foreign attachment is intended to affect property not in the control of any garnishee or other person within the Colony, a copy thereof written on parchment in lieu of such service as aforesaid shall be affixed in some conspicuous place on the property intended to be thereby affected. Such writ shall remain in force for three calendar months, including the day of the date thereof, and it cannot be served after such time.

Upon filing writ &c. foreign attachment to issue and to be served on garnishees.

5. In addition to such service or affixing as aforesaid, a copy of the said writ shall be published in the *Government Gazette* (if any) of the Province in which the writ shall have been issued, and twice at least in one of the newspapers (if any) published in the principal town of such Province, and in one of the newspapers (if any) published in the principal town of the Province in which the property intended to be thereby affected is situate.

To be also published in *Gazette* and newspapers.

6. From the time of the service of such writ upon any garnishee, all and singular the real and personal property of whatsoever nature in the custody or under the control of such garnishee then belonging to the defendant in the action, or to or in which such defendant shall then

Property and debts bound from time attachment served.

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be legally or equitably entitled or otherwise beneficially interested whether solely or jointly with any other person, and all debts of every kind then due by any such garnishee to such defendant, although the same or any 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 *bond fide* prior claim or lien thereon, shall be liable to the satisfaction of the particular demand or cause of action of which he shall by the said writ have had notice.

Garnishee parting &c. with property before attachment dissolved to be liable to damages.

7. If any such garnishee shall, without leave of the Supreme Court or one of the Judges thereof, 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 the action, he shall upon application in a summary way to the said Court or to a 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 to be made as to where cause of action arose, and as to property in garnishee's hands.

8. After such writ of attachment shall have been served or affixed and published as aforesaid, the said Court or a Judge thereof shall, on a day to be fixed by such Court or Judge, proceed to inquire and determine whether the plaintiff's cause of action arose in respect of any breach of contract made or to be wholly or in part performed within the Colony of New Zealand, and, if so, then what real and personal property belonging to the defendant has been affected by the service of the said writ as hereinbefore provided, and whether such real and personal property, or any property to which any copy of the writ of foreign attachment shall have been affixed in lieu of service as aforesaid, is or can be made available for the purpose of satisfying wholly or in part the claim of the plaintiff.

Powers of Court or Judge in making such inquiry.

9. For the purpose of disposing of any application to be made in a summary way under this Act, and for the purpose of making such inquiry and determination as aforesaid, it shall be lawful for the Court or Judge, in a summary way, to examine or permit the plaintiff to examine upon oath every such garnishee as aforesaid, and also any witnesses the Court or Judge may think proper, and for that purpose to make such orders and to issue such summonses to the several garnishees and witnesses as may be deemed expedient.

Garnishee or witness refusing to attend liable for contempt of Court.

10. Any garnishee or any witness who shall refuse or neglect to attend, or shall refuse to be examined, shall be liable to be summarily proceeded against for contempt of Court and to be punished accordingly: Provided always that it shall be lawful for the Court or Judge to dispense with the attendance of any garnishee or any witness on his submitting to be examined upon interrogatories, or before a Commissioner to be appointed, or upon such other terms as such Court or Judge shall impose.

Garnishees' or witnesses' expenses to be paid.

11. It shall be lawful for the Court or Judge to direct the reasonable expenses of any garnishee or witness to be paid by the plaintiff, and to direct that any sums so paid shall be costs in the cause.

Property available, or the proceeds thereof, to be held subject to attachment.

12. So soon as it shall have been determined by the Court or Judge as aforesaid what real and personal property can, consistently with existing liens or prior claims thereon (to be summarily determined by the said Court or Judge) be made available for the purpose of making satisfaction to the plaintiff, the said Court or Judge shall forthwith order the same or any part thereof to be thenceforth held and to continue subject to such attachment accordingly, or to be sold or otherwise disposed of or dealt with as such Court or Judge shall think fit, and the proceeds, or in the case of debts payable the amount thereof

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thereof, to be paid subject to the attachment into the hands of some officer of the Court; and as to all real and personal property to which such order shall not apply or as to which no such order shall be made, it shall be lawful for the said Court or Judge at any time to direct that the said attachment shall be dissolved.

13. A memorial of any such order, setting forth the date thereof, the title of the cause, and so much of the order as shall relate to the land thereby affected, may be registered in the Register Office for Deeds of the district in which such land is situate, and such registration shall be affected in the same manner and shall have the like effect as the registration of a suit pending.

Memorial of order may be registered in the Register Office for Deeds of the district where land situate.

14. When more than one writ of attachment shall have been issued against the same garnishee, 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 held 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.

Provision in cases when more than one writ of attachment.

15. It shall be lawful for the said Court or any Judge thereof at any time to authorize any garnishee, on application being made by him, after due notice thereof to the plaintiff, to sell or dispose of or otherwise deal with any real or personal property so attached as aforesaid, and any sum of money or any real or personal property received by virtue of or in respect of such authority shall be thereafter held by such garnishee, or be paid into Court, or invested or otherwise 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.

Court or Judge on application of garnishee may order sale &c. of property.

16. After the inquiry and determination as provided in section eight of this Act shall have been made as aforesaid by the said Court or by a Judge thereof, it shall be lawful for the plaintiff, on or after a day to be fixed by the Court or Judge for such purpose, to proceed in his action in the same manner as though the defendant resided in the Colony and had been duly served with the process of the Court: Provided that a bond as hereinafter prescribed shall have been first entered into; and if such bond be not entered into within fifteen days after the day so to be fixed as aforesaid, and the action proceeded with, the attachment shall be *ipso facto* dissolved and the action terminated.

After inquiry plaintiff on giving bond may proceed with action on a day to be fixed by the Court or Judge.

17. Such bond shall be entered into with the Registrar or Deputy Registrar of the Supreme Court, with sufficient sureties, satisfactory to a Judge thereof, and in such sum as any Judge thereof shall fix, and shall contain (amongst such other stipulations and conditions as such Judge may think proper and direct) a condition to pay to the said Registrar or Deputy Registrar all such sums as the said plaintiff shall recover in the action in case the judgment therein be thereafter vacated or reversed, together with the costs sustained by the defendant; and in case of any breach or alleged breach of the conditions of the said bond, it shall be lawful for the said Registrar or Deputy Registrar, by direction of a Judge of the said Court, to assign the said bond to the said defendant, who may then proceed thereon in his own name.

Nature of bond.

18. If pending any such writ of foreign attachment, or any time before final judgment shall be obtained in the action in which such writ issued, the defendant or any person on his behalf shall enter into a bond, with sufficient sureties, to be approved by a Judge of the Supreme Court, in such sums as such Judge shall think fit to order, conditioned to pay the plaintiff the amount of such debt or damages and costs as he shall at any time thereafter recover in the said action, it shall then be lawful for such defendant or person acting on his behalf to plead in the usual

If security given on behalf of the defendant, action may be defended.

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usual manner to the action within such time as such Judge shall direct, and to defend the same, and, upon giving five clear days' notice thereof to the plaintiff, to apply to the Court or to a Judge thereof, by motion as of course, that the attachment may be dissolved, and the same shall be dissolved accordingly, and the action shall thereupon proceed in the ordinary way.

After final judgment plaintiff may act as in ordinary action.

19. At any time after final judgment shall have been obtained by the plaintiff, it shall be lawful for him to act in all respects as in the case of a judgment of the Supreme Court obtained in the ordinary way, subject nevertheless to any award or determination made by the said Court or any Judge, where more than one writ of attachment shall have been issued against the same garnishee or person, or the same property shall have been attached at the suit of more than one plaintiff.

Court or judge may order debts due to defendant to be paid to plaintiff.

20. It shall also be lawful for the Court, or any Judge thereof, upon application of the plaintiff, at any time in a summary way to cause any debtor of the defendant to be summoned to attend such Court or Judge to show cause why he should not forthwith pay the amount of his debt to the plaintiff, and, if no sufficient cause be shown, to order such payment accordingly, and to enforce such order together with costs attending the same by an attachment for a contempt of Court as in other cases.

Court or Judge may order action to be brought for such debts.

21. It shall be lawful for such Court or Judge, either before summoning such debtor as aforesaid or after summoning him, if such Court or Judge shall see sufficient cause, to authorize an action for the amount of any such debt to be brought or carried on in the name of the creditor being such defendant as aforesaid. Such action shall be brought or carried on at the expense of the plaintiff, and any money recovered under the same shall be paid to the Sheriff, to be disposed of by him in the same manner as money received by him under *feri facias* issued by the plaintiff against the defendant.

Court may within three years order merits to be inquired into on application of defendant with substantial grounds of defence.

22. If after any final judgment obtained as aforesaid an affidavit or declaration as hereinafter provided shall be made by the defendant against whom such process of foreign attachment shall have been issued as aforesaid, that such defendant had at the time of obtaining the said judgment and still has a substantial ground of defence, either wholly or in part, to the plaintiff's action on the merits, and such affidavit shall at any time before the expiration of three years next after such judgment be filed in the Supreme Court of New Zealand, it shall be lawful for the said Court, upon motion by the defendant after ten days' notice thereof being given to the plaintiff, to cause the merits so alleged as aforesaid to be inquired into and determined in such manner and form, either summarily or by a feigned issue between the parties or otherwise, and at such time and under such terms and conditions, and after or without security for costs given, as to the said Court shall seem expedient for the purpose of securing the substantial ends of justice.

Such judgment may be given as justice of case requires.

23. The said Court after such inquiry and determination shall thereupon give such judgment in the matter for the vacating or reversal of the judgment in the original action, either in the whole or in part, and may from time to time make such order in the premises between the parties as the justice of the case shall appear to require.

Before whom affidavits under this Act may be sworn.

24. Any affidavit under this Act may be sworn in any place in Her Majesty's dominions before any person authorized by law to administer an oath in the place where the same is taken, and at any foreign port or place, before any Consul-General, Consul, Vice-Consul, or Consular Agent for the time being appointed by Her Majesty at such port or place; and every affidavit so sworn may be used and shall

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shall be admitted as evidence, saving all just exceptions, provided it purport to have the signature thereto of any person so authorized as aforesaid, or of any such Consul-General, Consul, Vice-Consul, or Consular Agent, and be duly certified in the usual way under the hand and seal of a notary public, or upon such other proof as the Court or Judge shall think fit to receive of the official character and signature of the person appearing to have signed the same.

25. If any person shall forge any such signature to any such affidavit, or shall use or tender in evidence any such affidavit with a false or counterfeit signature thereto knowing the same to be false or counterfeit, he shall be guilty of felony, and upon conviction thereof liable to penal servitude for any term not exceeding six years or less than one year; and every accessory before or after the fact to any such felony shall be liable to the same punishment as the principal.

Forgery of signature of affidavit felony.

26. Every person who shall be charged with committing any felony under this Act may be dealt with indicted tried and if convicted, sentenced, and his offence may be laid and charged to have been committed in any place within the Colony in which he shall be apprehended or be in custody; and every accessory before or after the fact to any such offence may be dealt with indicted tried and, if convicted, sentenced, and his offence may be laid and charged to have been committed in any place in which the principal offender may be tried.

Persons charged with felony may be tried in New Zealand, also accessories before and after the fact.

27. If any person shall wilfully and corruptly make a false affidavit before any person authorized by law to administer an oath as aforesaid, or before such Consul-General, Consul, Vice-Consul, or Consular Agent, every person so offending shall be deemed and taken to be guilty of perjury in like manner as if such false affidavit had been made in New Zealand upon competent authority, and shall and may be dealt with indicted tried and, if convicted, sentenced, and his offence may be laid and charged to have been committed in any place within the Colony in which he shall be apprehended or be in custody.

Persons making false affidavit guilty of perjury and may be tried in New Zealand.

28. The property of any such absent defendant 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 no process of foreign attachment against any such absent defendant, nor any lien intended to be thereby created upon any real or personal property of such defendant thereby attached, shall be defeated by reason of such co-defendant or any 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 purpose of this Act to attach property in the hands of the person having the actual care custody or control of the same for the time being.

Property in possession of co-defendant or wife may be attached.

29. Every writ of attachment, where the same shall have been followed by execution levied, may be pleaded in bar, by any person in whose hands any real or personal estate 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 action shall be brought pending attachment, such action shall be stayed by order of the Court or a Judge until the attachment shall be dissolved or the proceedings thereupon be otherwise determined.

Attachment after execution levied may be pleaded in bar.

30. It shall be lawful for the said Court or any one of the Judges thereof, 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 by a jury, and for that purpose to make all necessary orders as to the form thereof, and who shall be parties thereto, and in all such other respects as the said Court or Judge shall think fit.

Court or Judge may order questions to be tried by jury.

Unstamped Instruments.

Supreme Court may make rules.

31. In all cases where no provision or no sufficient provision is made by this Act, it shall be lawful for the Supreme Court or the Chief Justice thereof from time to time, for the purpose of facilitating or more effectually carrying into execution any of the objects of this Act, to make and prescribe all such general rules and also all such orders applicable to particular cases only touching any of the matters intended to have been hereby provided for, and touching also the manner and form of proceeding before or applying to the said Court and any Judge thereof respectively, and also the execution of writs and orders, and the allowance and taxation of costs, and touching all such other matters having reference to the provisions of this Act as to the said Court or Chief Justice may seem expedient, and such rules and orders from time to time to revoke or alter as to the Court or Chief Justice shall appear to be requisite: Provided always that it shall be lawful for any Judge of the said Court to exercise the power hereinbefore given to the Supreme Court or Chief Justice thereof to make and prescribe orders applicable to particular cases only.

When plaintiff does not proceed with diligence, Court or Judge may dissolve attachment.

32. If it shall appear to the said Court or to a Judge thereof at any time that a plaintiff is not proceeding *bonâ fide* or with due and proper diligence, it shall be lawful for such Court or Judge to dissolve the attachment and to direct the plaintiff to pay such costs to such persons as the said Court or Judge may deem reasonable: Provided always that no attachment under this Act shall be deemed to be dissolved from any cause whatever except by an order of the said Court or a Judge thereof.

Court or Judge may adjourn and award costs.

33. The Court and any of the Judges thereof shall in all cases whatsoever under this Act have full power of adjournment from time to time, and also, in all cases not provided for by this Act, to award or refuse costs to be paid by and to such party as the Court or Judge shall think fit.

Interpretation.

34. In the construction of this Act the word "Garnishee" shall include every person in whose hands any real or personal property shall be attached or liable to be attached.

Short Title.

35. This Act may for all purposes be cited as "*The Absent Debtors' Act, 1858.*"

No. VI.

UNSTAMPED
INSTRUMENTS.

AN ACT to declare Unstamped Instruments executed out of but affecting Real Estate within this Colony, admissible in Evidence. [28th May, 1858.]

Preamble.

WHEREAS doubts exist whether deeds and other instruments affecting real estate in the Colony of New Zealand, if executed at any place out of the Colony where stamp laws are in force, are admissible in evidence within the Colony, on the ground that such deeds and other instruments are not stamped, and it is expedient to remove such doubts:

BE IT THEREFORE DECLARED AND ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

Instruments affecting land in the Colony not inadmissible in evidence on account of not being stamped.

1. No deed or other instrument affecting real estate within the Colony of New Zealand, or power of attorney authorizing the execution of any such deed or other instrument, shall, wheresoever executed, be