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No. 32.

3rd Session, 5th Parliament, 20 Victoria, 1857.

B I L L .

An Act to amend the Common Law Procedure Act 1856, and to facilitate the remedies on Bills of Exchange and Promissory Notes.

Received and read first time, Tuesday, 3rd
March, 1857.

Second reading, Friday, 6th March, 1857.

Hon. Mr. Atty. Genl. MACDONALD.

S. Derbshire & G. Desbarate, Queen's Printer.

An Act to amend the Common Law Procedure Act 1856, and to facilitate the remedies on Bills of Exchange and Promissory Notes.

HER Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

1. The Clerks of the Crown and Pleas, the Clerk of the Pro-
 cess and the Deputy Clerks of the Crown and Pleas in the
 Courts of Queen's Bench and Common Pleas in Upper Canada,
 shall, within two calendar months after this Act shall come into
 force, or within one month next after being appointed to either
 of the said offices, give security by bond to Her Majesty, Her
 Heirs and Successors in such sum (not being less than one
 hundred pounds) and with so many sureties (not less than two
 in a sum not less than fifty pounds each) as the Governor in
 Council shall direct, conditioned for the due rendering of the
 quarterly accounts and returns required from them by law, and
 for the due payment to the Receiver General of this Province,
 of all the fees, dues, emoluments, perquisites and profits re-
 ceived by them on account of their said offices respectively,
 and for and on account of any duty or service done and per-
 formed by them respectively, in their said several offices ; and
 the neglect to give such security by any such Clerk or Deputy
 Clerk or to render quarterly returns, or to pay over all such
 moneys within twenty days next after each quarterly day, shall
ipso facto render his appointment void, and vacate his office :
 Provided that such avoidance shall not annul or affect any act,
 matter or thing done by any such Clerk or Deputy Clerk,
 during the time that he shall actually hold his appointment.

Clerks of the Crown and Pleas and their Deputies, and the Clerk of the process, to give security within a certain time ; for what purpose and to what amount, &c.

Failure to give such security, to vacate their offices.

Proviso.

- II. The Governor of this Province shall approve of the bonds
 and sureties to be given by the said Clerks, (and Deputy Clerks,
 the Judge of the County Court first certifying his approval in
 writing of the bond and sureties to be given by the Deputy
 Clerk of the Crown for his County,) and such bonds shall, as
 soon as they are so executed and approved, be duly recorded in
 the manner provided by the third section of the Statute passed
 in the session of the Provincial Parliament, held in the fourth
 and fifth years of Her Majesty's Reign, chaptered ninety-one,
 and then deposited in the office of the Inspector General of
 Public Provincial Accounts ; and if any surety in any such bond
 shall die or cease to reside in Upper Canada, or become insol-
 vent, it shall be the duty of such Clerk or Deputy Clerk within
 one month of his knowledge of the fact or after being thereto
 required by the Inspector General, to give a new bond, in

Bonds and sureties to be subject to approval of the Governor.

Bonds to be recorded under 4, 5 V. c. 91.

New bond to be given in case of death, &c., of a surety.

Failure to
avoid office.

manner hereinbefore provided, and the omission to give such new bond shall render the appointment of the Clerk or Deputy Clerk so omitting void.

Deputy Clerks of the Crown to transmit any *Nisi Prius* record to Toronto, or deliver the same sealed up, on proper notice, &c.

III. Every Deputy Clerk of the Crown shall, within twenty-four hours after notice in writing delivered to him at his office, for that purpose, enclose, seal up and transmit by post to the proper principal office at Toronto, addressed to the Clerk thereof; or deliver to the Attorney giving such notice, on receiving from him a written receipt for the same, enclosed and sealed up, any record of *Nisi Prius* in his custody to be mentioned in such notice, together with all exhibits filed at the trial, and in default thereof, he may be adjudged guilty of a contempt of Court, and be dealt with in the discretion of the Court accordingly. And if after such notice the *Nisi Prius* record shall not be in Court at the time of moving any rule requiring a reference thereto, the party moving may, on filing an affidavit of the service of notice, and that the record was not delivered to the party serving the same, be allowed by the Court to move any such rule without the production of the Record or *Nisi Prius*.

Failure to be a contempt.

After such notice, a party may move although the record be not in Court; first filing affidavit of Notice.

And with respect to Bills of Exchange and Promissory Notes Be it enacted as follows :

Form of summons in actions on Bills or Notes, after 21st August, 1857.

IV. From and after the twenty-first day of August next, all actions upon Bills of Exchange or Promissory Notes, commenced in either of the Superior Courts of Common Law, within six months after the same shall have become due and payable, may be by writ of summons in the special form contained in the Schedule to this Act annexed, numbered one, and endorsed as is therein mentioned; and it shall be lawful for the Plaintiff on filing an affidavit of personal service of such writ within the jurisdiction of the Court or an order for leave to proceed as provided by the Common Law Procedure Act, 1856, and a copy of the writ of summons and the indorsements thereon, in case the Defendant shall not have obtained leave to appear, and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in the schedule numbered two to this Act annexed (on which judgment no proceeding in error shall lie) for any sum not exceeding the sum endorsed on the writ, together with interest at the rate specified (if any), to the date of the Judgment, and a sum for costs to be fixed by rule of Court, unless the Plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the Plaintiff, may upon such judgment issue execution forthwith.

Final judgment may be signed on proof of service, unless Defendant obtain leave to appear and do appear.

For what amount, &c.

How leave to appear may be obtained by Defendant.

V. A judge of either of the said Courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ and defend the action on the defendant paying into Court the sum endorsed on the writ, or upon affidavits satisfactory to the Judge, which disclose a legal

or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the judge may seem fit.

5 VI. After judgment, the Court or a Judge may, under special circumstances, set aside the judgment and, if necessary, stay or set aside execution, and may give leave to appear to the writ, and to defend the action, if it shall appear to be reasonable to the Court or Judge so to do, and on such terms as to the Court or Judge may seem just. Judgment may, under special circumstances, be set aside, and how.

10 VII. In any proceedings under this Act, it shall be competent to the Court or a Judge to order the bill or note sought to be proceeded upon to be forthwith deposited with an officer of the Court, and further to order that all proceedings shall be stayed until the plaintiff shall have given security for the costs thereof. Deposit of Bill, &c., and security for costs, may be ordered.

15 VIII. The holder of every dishonored bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting or protesting the same for non-acceptance or non-payment, or otherwise, or of damages, where damages for non-payment are by law recoverable, by Same remedy for expenses of protest, damages, &c., as for amount of Bill or Note.
 20 reason of such dishonor, as he has under this Act for the recovery of the amount of such bill or note.

IX. The holder of any bill of Exchange or promissory note may proceed against all the parties to such bill or note under this Act in one action in conformity with the provisions of the All parties to the Bill or Note may be sued in one action under this Act.
 25 Acts of the Parliament of Upper Canada, and of this Province, enabling the bringing a joint action against all the parties to any bill of Exchange or promissory note.

And with respect to proceedings for the revival of judgments, Be it enacted as follows :

30 X. The two hundred and second section of the Common Law Procedure Act, 1856, is hereby repealed, and during the lives of the parties to a judgment or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within six years from the recovery of the Sect. 202 of 19, 20 V. c. 43, repealed, and new provision made.
 35 judgment, execution may issue without a renewal thereof.

And with respect to Equitable defences ; Be it enacted as follows :

40 XI. The two hundred eighty-seventh section of the Common Law procedure Act, and the words placed between that and the next preceding section, are hereby repealed, and after this Act shall come into force it shall be lawful for the defendant Sect. 287 of 19, 20 V. c. 43, repealed and new provision made.

or the plaintiff in replevin in any cause in either of the Superior Courts in which, if Judgment were obtained, he would be entitled to relief against such Judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and the said Courts are hereby empowered to receive such defence by way of plea, provided that such plea shall begin with the words "For defence on Equitable grounds," or words to the like effect. 5

And as to reference to arbitration ordered at the trial; Be it enacted as follows: 10

Judge at *N. P.* directing reference at trial, may do so in the manner provided by sects. 84 and 85 of 19, 20 V. c. 43, and powers and proceedings of Arbitrators to be as under sections 86 and 87. XII. The Judge at *Nisi Prius* directing any reference under the one hundred and fifty-sixth section of the Common Law Procedure Act, 1856, may direct such reference, if he shall see fit to do so, in like manner as he has power to do under the eighty-fourth and eighty-fifth sections of the said Act, and every arbitrator so appointed at *Nisi Prius* shall be subject to the provisions of the said sections, and shall have the powers expressed in the eighty-sixth section and be subject to the same regulations as are mentioned and provided in regard to arbitrators in and by the eighty-seventh section of the said Act. 15 20

And as to proceedings against Garnishees; Be it enacted as follows:

What order shall be made when the amount is within the jurisdiction of a County or Division Court. XIII. When the amount claimed as due from any garnishee, shall be within the Jurisdiction of any County or division Court, the order to be made under the one hundred and ninety-fourth section of the Common Law Procedure Act, 1856, shall be for the garnishee to appear before the Judge of the County Court within whose Jurisdiction the garnishee resides—at some day and place within his County to be appointed in writing by such Judge—and written notice thereof to be given to the garnishee at the time of the service of the order, and if the garnishee does not forthwith pay the amount due by him, or an amount equal to the Judgment debt, and does not dispute the debt due or claimed to be due from him to the Judgment debtor, or if he does not appear before the Judge named in the order at the day and place appointed by such Judge, then such Judge may on proof of service of the order and appointment having been made four days previous, make an order directing execution to issue out of the County Court or division Court according to the amount due, and which order shall be sufficient authority for the clerk of either of such Courts to issue execution without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the Judgment debt; but if the garnishee disputes his liability, such Judge may order that the Judgment creditor shall be at liberty to proceed against the garnishee according to the usual practice of the County or division Court as the case may require for the alleged debt or for the amount due to 25 30 35 40 45

Notice to garnishee. 30

Execution from County or Division Court, if the garnishee does not dispute the debt. 40

Proceedings if he disputes the debt. 45

the Judgment debtor, if less than the Judgment debt and for costs of suit, and payment by or execution levied upon the garnishee, in any such case shall be a valid discharge to him as against the Judgment debtor to the amount paid or levied although the proceeding may be set aside or the Judgment reversed.

And with respect to execution ; Be it enacted as follows :

- XIV. After this Act shall come into force, the sheriff, or other officer having the execution of any writ of *fiery facias* against goods sued or to be sued out of either of the said Courts, or of any precept made in pursuance thereof, may and shall seize and take any money or bank notes, and any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money belonging to the person against whose effects such writ of *fiery facias* shall be sued out, and may and shall pay to the party suing out such execution any money or bank notes, which shall be so seized or a sufficient part thereof, and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties or other securities as a security or securities for the amount by such writ of *fiery facias* directed to be levied, or so much thereof as shall not have been otherwise levied or raised, and may sue in the name of such sheriff for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived ; and the payment to such sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty or other security with or without suit, or the recovery and levying execution against the party liable, shall discharge him to the extent of such payment or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty or other security, and such sheriff may and shall pay over to the party suing out such writ, the money to be so recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied ; and if after satisfaction of the amount so to be levied together with sheriff's poundage and expences, any surplus shall remain in the hands of such sheriff, the same shall be paid to the party against whom such writ shall be so issued ; provided that no such sheriff shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty or other security, unless the party suing out such execution shall enter into a bond with two sufficient sureties for indemnifying him from all costs and expences, to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof ; the expence of such bond to be deducted out of any money to be recovered in such action.

Sheriff may seize money, and securities for money.

Money seized to be paid over to party taking out the execution.

How the securities seized shall be dealt with.

Payments thereon to the Sheriff to be valid.

Sheriff to pay over moneys so paid to him.

Surplus to be paid to the party against whom the execution issued.

Sheriff not bound to sue until secured.

XV. From and after the twenty-first day of August next, Sect. 19 of the nineteenth section of the Act of the Parliament of this Pro- 12 V. c. 63,

repealed from
21st August,
1857.

Times at
which the
Terms of Q.
B. and C. P.
shall be there-
after held.

vince, passed in the twelfth year of Her Majesty's Reign, intituled, *An Act to make further provisions for the admististration of Justice by the establishment of an additional Court of Common Law, and also a Court of error and appeal in Upper Canada, and for other purposes therein mentioned*, shall be and the same is hereby repealed, and the terms of sitting of the Court of Queen's Bench and Common Pleas in Upper Canada, shall be as follows: Trinity Terms shall begin on the Monday next after the twenty first day of August, and shall end on the Saturday of the ensuing week; Michaelmas Term shall begin 10 on the third Monday in November, and shall end on the Saturday of the ensuing week; Hilary Term shall begin on the first Monday in February, and shall end on the Saturday of the ensuing week; and Easter Term shall begin on the third Monday in May and shall end on the Saturday of the ensuing 15 week.

Secte. 152 and
153 of 19, 20 V.
c. 43, repealed
after Trinity
Term, 1857.

Times at which
Courts of As-
size and Nisi
Prius shall be
thereafter held.

May be held
with or with-
out commis-
sions.

Who shall
preside if com-
missions issue.

And if no com-
missions issue.

Powers of Jud-
ges, &c., pre-
siding at such
Courts.

XVI. The one hundred and fifty-second and the one hundred and fifty-third sections of "The Common Law Procedure Act, 1856," are hereby repealed from and after the last day of Trinity Term next; and thenceforth Court of Assize and Nisi Prius, of 20 Oyer and Terminer and of General Gaol Delivery shall be held in every County or Union of Counties in Upper Canada, (except in that County or Union of Counties within which the City of Toronto is situate,) in each and every year in the vacations between Hilary and Easter Terms and between Trinity and 25 Michaelmas Terms, with or without commissions as to the Governor of this Province shall seem best, and on such days as the Chief Justices and Judges of the said Superior Courts of Common Law in Upper Canada shall respectively name: and if commis- 30 sions are issued then such Courts shall be presided over by any one of the persons to be named in such commissions (among whom shall always be the Chief Justices and Judges aforesaid, and any one of whom being present shall always preside in the said Courts,) and to whom may be added such of the Judges of the County Courts or of Her Majesty's Counsel learned in the law 35 of the Upper Canada Bar as shall be named in any one or more of such commissions and who shall preside in the absence of the Chief Justices and Judges of the Superior Courts.) But if no such commissions are issued then the said Courts shall be 40 presided over by one of the Chief Justices or of the Judges of the said Superior Courts, or in their absence then by some one of Her Majesty's Counsel learned in the law of the Upper Canada Bar, or by some one Judge of a County Court, who may be requested 45 by any one of the said Chief Justices or Judges of the Superior Courts to attend for that purpose; and each and every of the said Chief Justices and Judges and of such of Her Majesty's Counsel learned in the law, and of such Judges of the County Court presiding at any Court of Assize and Nisi Prius, 50 or of Oyer and Terminer and General Gaol Delivery shall and may possess, exercise and enjoy all and every the like powers and authorities as have been usually set forth and granted in

- commission issued for holding all or any of the said Courts ; and it shall not be necessary to name any associate Justices in any commissions of Oyer and Terminer and General Gaol Delivery that may be issued or that any associate Justices should be nominated or should attend and be present at any Court of Oyer and Terminer and General Gaol delivery to be holden after the day in this clause mentioned, and all such Courts shall in like manner be held in the County or Union of Counties within which the City of Toronto is situate, three times in each year, to commence on the Thursday next after the holding the Municipal Elections in January, on the Second Monday in April, and on the Second Monday in October in each year : Provided that nothing herein contained shall restrict the Governor of this Province from issuing special commissions for the trial of any offenders when he shall deem it expedient to issue any such commissions.

Associate Justices need not be named in commissions of Oyer and Terminer and Gaol Delivery, or attend at the Courts held under them.

Proviso : saving power to issue special commissions.

- XVII. The provisions of the Common Law Procedure Act, 1856, and all rules of Court made under or by virtue thereof shall, so far as the same are or may be made applicable, extend and apply to all proceedings to be had or taken under this Act, and the powers conferred on the Judges by that Act shall be and are hereby extended to the making from time to time all rules, and new forms of proceedings necessary for giving effect to this Act.
- XVIII. In citing this Act in any instrument, document or proceeding, it shall be sufficient to use the expression, " The Act amending the Common Law Procedure Act, 1856."

Provisions of 19, 20 V. c. 43, to apply to proceedings under this Act ; rules and forms, for giving effect to which, may be made.

Short Title of this Act.

Schedule referred to in the foregoing Act.

No. 1.

VICTORIA, by the Grace of God, &c.
To C. D. of in the County of

(PROCESS SEAL.)

We warn you that unless within twelve days after the service of this Writ on you, inclusive of the day of such service, you obtain leave from one of the Judges of our Court of (Queen's Bench, or of Common Pleas, *as the case may be*) at Toronto to appear, and do within that time appear in our Court of in an action at the suit of A. B. the said A. B. may proceed to judgment and execution.

Witness, &c.

Memorandum to be subscribed on the Writ.

N. B.—This Writ is to be served within six calendar months from the date hereof, or if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsement to be made on the Writ before service thereof.

This Writ was issued by E. F., of _____, Attorney for the Plaintiff, or this Writ was issued in person by A. B., who resides at (*mention the City, Town incorporated, or other Village or Township within which such Plaintiff resides*).

Indorsement.

The Plaintiff claims £ _____, principal and interest, (or £ _____ balance of principal and interest) due to him as the payee (or "endorsee," &c.) of a Bill of Exchange, (or "Promissory Note,") of which the following is a copy (*here copy Bill of Exchange or Promissory Note, and all endorsements upon it*), and also _____ shillings for noting (or "protesting," as the case may be,) and £ _____ for damages (*if damages be recoverable on the Bill under 12 Vict. chap. 76*) and £ _____ for costs, and if the amount thereof be paid to the Plaintiff, or his Attorney, within eight days from the service hereof, further proceedings will be stayed.

Notice.

Take notice, that if the Defendant do not obtain leave from one of the Judges of the Queen's Bench or Common Pleas, within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do within such time, cause an appearance to be entered for him in the Court out of which this Writ issues, the Plaintiff will be at liberty at any time after the expiration of such twelve days, to sign final judgment, for any sum not exceeding the sums above claimed, and the sum of £ _____ for costs and issue execution for the same.

Leave to appear may be obtained, on an application at the Judge's Chambers, Osgoode Hall, Toronto, supported by affidavit, shewing that there is a defence to the action on the merits, or that it is reasonable that the Defendant should be allowed to appear in the action.

Indorsement to be made on the Writ after service thereof.

This Writ was served by X. Y., on C. D., (the Defendant or one of the Defendants,) on _____ day, the _____ day of _____, 18 _____.

(Signed,) X. Y.

No. 2.¹

In the (Q. B., or C. P.)

On the _____ day of _____, in the year of our
 Lord, 18 _____.

Upper Canada, } A. B., in his own person (or by _____ his
 to wit : } Attorney) sued out a Writ against C. D., in-
 dorsed as follows :

(Here copy Indorsement of Plaintiff's claim.)

And the said C. D., has not appeared, therefore it is con-
 sidered that the said A. B. recover against the said C. D., £
 together with £ _____ for costs of suit.