

4th Session, 3d Parliament, 14 Victoria, 1851.

BILL.

An Act to confirm decrees and orders,
and other proceedings of the Court
of Chancery of Upper Canada, in
certain cases.

Received and read a first time, Friday, 30th May,
1851.

Second Reading, Monday, 9th June, 1851.

Mr. PRINCE.

3/3

B I L L.

An Act to confirm decrees and orders and other proceedings of the Court of Chancery of Upper Canada, in certain cases.

WHEREAS by a certain Act of the Parliament of Preamble.

that part of this Province, heretofore constituting the Province of Upper Canada, intituled, "*An Act to establish a Court of Chancery in this Province,*" it was

Act of U. C. 7 W. iv., c. 2, recited.

5 amongst other things enacted, That the Vice Chancellor of the said Court thereby constituted and established, should have full power and authority, from time to time, to settle and declare the form of process and to define the practice and proceedings to be observed in the said
10 Court of Chancery in prosecuting and defending suits therein; And whereas in pursuance of the said authority, the Vice Chancellor of the said Court made and passed the several orders mentioned and set forth in the Schedule marked A. hereunto annexed: And whereas under or by
15 virtue of the said orders, divers decrees and orders of the said Court have been made as well for the foreclosure of divers mortgages of lands as for the sale of mortgaged premises, for the rescision of contracts, for the sale and purchase of lands, and for other purposes relating to or affecting real estate in that part of this Province,
20 heretofore constituting the Province of Upper Canada, in cases in which the defendants in the said suits, or some or one of them, have been absent from the part of this Province aforesaid and resident without the jurisdiction
25 of the said Court; and in cases when, though the defendants have been resident within the county, and have been personally served with process, the subsequent proceedings have been conducted against them *ex parte* and without further notice; And whereas in order to obviate
30 all doubts which have arisen or may arise as to the titles of the Lands affected by such decrees or orders of the said Court, it is expedient that the same decrees or orders should be ratified and confirmed: Be it therefore, &c.

35 And it is hereby enacted by the authority of the same, That all and every the decrees, orders, and all other proceedings of the said Court, made for any or either of the purposes aforesaid, under or in pursuance of the said orders of the said Court of Chancery, in the said Schedule set forth, which have been respectively pronounced,
40 enforced and perfected, shall be and the same and each and every of them is and are hereby ratified and con-

Certain decrees &c. made under the old orders as to absent Defendants, confirmed.

firmed, and shall be, and be deemed and taken to be as valid and effectual in all respects and to all intents and purposes, as if the defendants in the several suits wherein such decrees or orders have been respectively pronounced or made, had been resident in the part of this Province aforesaid, and within the jurisdiction of the said Court of Chancery and had respectively appeared in the said Court of Chancery in the said suits, and the proceedings in the same had been prosecuted to judgment or decree, and all other proceedings had been had and taken therein, and the defendants had been respectively served therewith, according to the usual course and practice of the said Court of Chancery, in suits wherein the defendants have appeared.

Certain suits commenced but not ended may be completed as if no doubts existed as to such old orders.

II. And be it enacted, That it shall and may be lawful to and for the said Court of Chancery, in all suits commenced in the said Court under the orders in the said Schedule mentioned, or any or either of them, and in which suits before the passing of this Act, an order for a defendant's appearance was made or process was served, under or by virtue of the said orders in the said Schedule set forth, as well to make all necessary orders and decrees for the purpose of enabling the parties to prosecute the same suits, as for enforcing, perfecting and carrying out all such decrees and orders of the said Court, and for confirming all such reports as have at any time or times, on or before the first day of January last, been made or pronounced under the said orders in the said Schedule mentioned, and as have not hitherto respectively been enforced or perfected or confirmed, in such and the same manner as the same would have been respectively prosecuted, enforced or perfected or confirmed by any order or orders of the said Court of Chancery, in case no doubts had arisen or could arise touching the validity of the said orders in the said Schedule mentioned, or touching the necessity of serving the defendants with, or with notice of the proceedings, or any or either of the proceedings subsequent to the first process in any such suits; and such decrees, orders and reports respectively shall, when the same respectively shall be so pronounced, enforced, perfected, or confirmed, be as valid and effectual in all respects and to all intents and purposes, as if the defendants in the several suits, had been respectively resident in the part of this Province aforesaid, and within the jurisdiction of the said Court of Chancery, and had respectively appeared therein, and the proceedings in the same suits had been prosecuted, and all proceedings had and taken therein, and the defendants had respectively been served therewith, according to the usual course and practice of the said Court in suits wherein the defendants have appeared.

III. Provided always, and be it enacted, That in suits against absent defendants under and by virtue of the said orders, all proceedings commenced or had after the passing of this Act, and which if such defendants had appeared in the said suits, would have required to be served on such defendants or their Solicitor, shall be served on the Attorney General for Upper Canada, or in his absence on the Solicitor General for the time being.

Service to be made on Attorney General in suits under such orders.

IV. Provided always, and be it enacted, That nothing herein contained shall affect the right of any party in or to the said suits or any of them, to appeal against the said decrees or orders of the said Court enforced or to be enforced as aforesaid, in such and the same manner as such parties would have been entitled to appeal, in case such decrees or orders had been made or pronounced in suits wherein the Defendants had appeared, on any question touching such decrees or orders other than a question relating to or affecting the said orders in the said Schedule to this Act, or relating to or affecting the necessity of serving any proceedings or proceeding subsequent to the first process in any such suits.

Right of appeal saved.

V. And be it enacted, That when any report has been heretofore made by the master of the said Court upon proceedings taken in the master's office *ex parte*, under a decree *pro confesso*, obtained against a Defendant under the said order in Schedule A, No. 75, such report shall not be held nor treated as invalid because of the proceedings on which the same was founded having been had in the master's office *ex parte*, and without notice to the defendant, and such report so obtained *ex parte* shall be as valid and effectual as if such notice had been given and the Report had been confirmed and allowed by the said Court.

Certain Reports of master obtained *ex parte*, to be valid.

VI. Provided always, and be it enacted, That the defendant or defendants, or his or their representatives, in any cause wherein such decree or order or report as aforesaid, shall have been or shall or may be made or pronounced as aforesaid, may, within six months after the passing of this Act, or the pronouncement of such decree, appear in the said Court of Chancery in the cause, and petition to be heard; and the party so petitioning, upon paying or securing to be paid such costs as the said Court shall adjudge, and submitting to such terms as to the said Court shall under the circumstances of the case seem just and reasonable, may, in the discretion of the Court, (subject to appeal,) be admitted to answer the complainant's bill, or have the report re-opened and the proceedings taken afresh in the master's office, and the suit shall then proceed in the same manner as if such defendant had appeared in due season and no decree or no report had been made, as the case may be.

Defendant may within six months petition the Court to be heard on such conditions as the Court shall impose.

Power to Defendant to come in and have the sale stayed, on his paying costs and complying with terms.

VII. Provided always, and be it enacted, That in all cases wherein such decrees or orders of the said Court, have been or shall or may be made or pronounced for the foreclosure or satisfaction of a mortgage, or the sale of premises mortgaged or charged with the payment of money, by way of legacy or otherwise, if the defendant at any time before the sale of the premises by the mortgagee or his representatives, and within one year after the passing of this Act, shall appear and pay to the complainant such costs as the said Court shall award, and submit to such terms as to the said Court shall, under the circumstances of the case, seem just and reasonable, the said Court shall stay the sale, and the same proceedings shall be thereafter had as if the defendant had regularly appeared, and had been served with notice of all subsequent proceedings.

No sale to be affected by Defendant appearing afterwards; but Defendant or his representatives may within one year file a Bill for an account.

VIII. Provided always, and be it enacted, That no sale or conveyance *bonâ fide* made under or by virtue of or subsequent to the said decrees or orders, hitherto made or pronounced or to be made or pronounced under the provisions of this Act, upon a bill fyled for the foreclosure or satisfaction of a mortgage or other charge, shall be affected or prejudiced by the appearance of the defendant under the provisions hereinbefore contained, nor, subject to such right of appeal as aforesaid, by any other proceeding; but such defendant or his representatives may at any time within one year after the passing of this Act, or the making of such decree, order, or report, fyle a bill or petition against the complainant or his representatives, in the said Court, to account for all moneys received by them by virtue of such sale, over and above the amount which, by the master's report in the cause, shall have been found justly due on the mortgage, and the costs of suit, together with his costs, charges and expenses subsequently incurred, with interest for the same, respectively; and the said Court shall proceed upon such bill, and make such decree therein as, under the circumstances of the case, shall seem just and reasonable.

See Page 307.

see Page 313,

SCHEDULE A.

ABSENT DEFENDANTS.

63. That whenever a defendant has left this Province, or is resident elsewhere, by reason whereof such defendant cannot be served with the process of *subpœna* to appear and answer the plaintiff's bill, the plaintiff shall be at liberty, on motion supported by affidavit of the fact to the satisfaction of the Court, in the form or to the effect hereinafter set forth, to obtain an order requiring the defendant to cause his or her appearance to be entered with the Registrar, and notice thereof to be served on the Plaintiff's Solicitor, within two months from the date of such order if the defendant reside in the Province of Lower Canada, within four months from the date of such order if the defendant reside in any part of the United States of America, and within nine months from the date of such order if the defendant reside in any part of the United Kingdom of Great Britain and Ireland or elsewhere; and the defendant shall accordingly appear and cause his or her answer to the bill to be filed, and an office copy thereof to be served on the plaintiff's solicitor at or before the expiration of the respective periods aforesaid, as the case may be, and in default thereof, the bill shall be taken as confessed by the defendant: Provided nevertheless, that the plaintiff's solicitor do, on obtaining such order as aforesaid, either cause a copy thereof to be published in such newspapers as the Court may direct, such publication to be continued in such newspapers at least once in each week for eight weeks in succession, or in case the defendant shall come to this Province, do cause a copy of such order to be personally served on the defendant at least twenty days before the time prescribed above for appearing and putting in his or her answer; and in case where the place of residence of the defendant is known to the plaintiff, he shall, in addition to causing the publication of the order in the newspapers in the manner hereinbefore directed, also cause a copy of such order to be transmitted by post to the defendant addressed to him at his place of residence. That the Court shall be satisfied by affidavit or otherwise, that the aforesaid several provisions have been complied with on the part of the plaintiff, and that no appearance has been entered by the defendant with the registrar, before an order shall be entered taking the bill as confessed by such defendant in manner hereinbefore provided. That the affidavit above referred to shall be in the following form or to the like effect, that is to say:

In Chancery Between, &c. A. B., of &c.
 maketh oath and saith, that a writ of *subpœna* to appear and answer in the abovenamed suit, was issued out of, and under the seal, of this Honorable Court directed to the abovenamed defendant C. D., (a copy whereof is hereunto annexed) and was delivered to this deponent to be served, but this deponent could not find the said C. D. to serve him therewith (and if the defendant can so state he shall proceed to add.)

that he, this deponent, well knows that the said defendant did formerly reside at ———, in this Province, but has since left the same, and now resides at ———, (*but if these facts are not within the deponent's knowledge, then the affidavit must proceed thus*), and he, this deponent, was informed by (*here state the name of the informer and his connection with the absent defendant, that the Court may judge how far the information given may be relied on.*) that he knew the defendant C. D., and that he formerly resided at ——— in this Province, but has since left the same and now resides at ——— in the Province of Lower Canada, or at ——— in the United States of America, (*if the deponent can so depose upon the information given, or generally, if he be unable to state the particular place in the United States of America.*) or at ——— in England, Scotland or Ireland (*or elsewhere, or as the case may be.*) *If the defendant have never resided in this Province the affidavit must be varied accordingly.*

66. That in order to remove doubts which have arisen upon the construction of the order of the 25th of August, 1837, where the same applies to proceedings on the Common Law side of the Court, his Honour doth order that the same course of proceedings shall be adopted on the Common Law side of the Court, with respect to defendants out of the jurisdiction thereof, as by the said order is prescribed with reference to proceedings on the Equity side, *mutatis mutandis*.

68. That in all cases within the order of the 25th August, 1837, relative to defendants out of the jurisdiction, after any state of facts shall have been carried into the master's office, pursuant to the reference directed by the decree, the warrant on leaving such state of facts, henceforth shall be discontinued, and the Plaintiff shall be at liberty immediately to apply for and obtain a warrant to proceed on the state of facts.

178. Whereas in the case of defendants residing without the jurisdiction of this Court, but whose place of residence is known and who may therefore be served personally with the process of this Court to compel such defendants to appear to and answer the plaintiff's bill, it is deemed advisable to allow plaintiffs to proceed against such absent defendants, by personal service of such process in cases where the same can be effected, instead of according to the present mode of proceeding against absent defendants, it is therefore ordered that upon motion in open Court, founded upon affidavit or affidavits and such other documents of evidence, if required or proper, as may be applicable for the purpose of ascertaining the residence of any defendant or defendants residing without the jurisdiction of the Court, and the facts material to identify such defendant or defendants and his or their place or places of residence, it shall be competent for the Court to order and direct, that service of a *subpœna* to appear and answer, upon such terms and in such manner, and at such times, as to the said Court shall seem reasonable (or in cases where the Court shall deem fit, upon the receiver, steward, bailiff, agent, or

other person receiving or remitting rents of lands and premises, if any, in the suit mentioned, or otherwise acting on behalf of such defendant or defendants in relation to the matter or matters which are the subject of such suit, returnable at such time as the Court shall direct,) together with a copy of such order and of the prayer of the plaintiff's bill, shall be deemed good service upon such defendant or defendants, such order to direct also in what mode such service may be authenticated, in cases where such service may be effected without the jurisdiction of this Court; and in case such defendant or defendants shall, after such service make default in appearance by the time limited by such order and process aforesaid, the plaintiff shall be at liberty to enter an appearance for such defendant or defendants, upon filing with the registrar an affidavit of such service sworn as in such order directed; and if the defendant shall not answer the plaintiff's bill within the time limited by such order, the plaintiff shall be entitled to an order to set down the cause for hearing, in order that the Bill may be taken *pro confesso* against such defendant or defendants, upon filing with the Registrar his *praecipe* for that purpose; and thereupon a decree may be made and enforced against such defendant or defendants accordingly, unless the Court on special circumstances disclosed by affidavit, shall allow further time to such defendant or defendants to answer the plaintiff's bill; provided nevertheless that the following notice or such other notice as the Court may in any case direct, shall in such cases be endorsed on the said writ of *subpoena*, and signed by the Solicitor for the plaintiff,

ORDINARY NOTICE to be endorsed *ad respondendum* in Absent Defendant Cases:

" You are served with this process to the intent that you may, either in person or by your Solicitor, appear in Her Majesty's Court of Chancery at Toronto, by filing your appearance with the Registrar of the said Court within _____ after the service hereof upon you, exclusive of the day of such service, and that you may answer a bill of complaint filed against you by _____, a copy of the prayer of which said bill is served upon you herewith; and you will take notice, that unless you enter such appearance, an appearance will be entered for you by the plaintiff at the expiration of the said _____ and unless you answer the said bill at or before the expiration of _____ after such appearance shall have been entered by you or for you, you will be considered as confessing the truth of the several matters alleged in the said bill of complaint, and a decree will thereupon be made and enforced against you."

Ordered that in case the Court shall think fit so to direct, it shall be competent for the Court to order that the plaintiff be at liberty either to proceed against such absent defendant by such personal service of process, or by publication of order by advertisement, according to the previous practice of the Court in that

behalf; and in such case the plaintiff shall be at liberty, for the purposes of such advertisement, to take the usual order in absent defendant cases under the previous practice as aforesaid, without any further application to the Court in respect thereof.

75. That in all cases where the Plaintiff shall personally serve the defendant with the writ of *subpœna* to appear and answer the bill, and the defendant shall make default in appearance at the time limited by the practice of the Court, the plaintiff shall be at liberty to enter an appearance for such defendant; and if the defendant shall not answer the bill within the time limited by the Court in that behalf, the bill may be ordered to be taken "*pro confesso*," and a decree made and enforced against him accordingly, unless the Court on special circumstances disclosed by affidavit, shall allow further time to the defendant to answer, in which case no such order shall be entered until the expiration of such further time allowed; Provided, nevertheless, that the following statement shall be added to the notice at present endorsed on the said writ of *subpœna*, and signed by the Solicitor for the plaintiff, that is to say;—And you will take notice that unless such appearance as before mentioned shall be entered, an appearance will be entered for you; and if you do not answer the said complainant's bill at or before the expiration of twenty-eight days, from and exclusive of the day on which such appearance shall be entered for you, you will be considered as confessing the truth of the matters alleged in the said bill of complaint, and a decree will be made and enforced against you.

See Report of Select Committee on this Bill in page 238 of the Journals of last Session, 1850.