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"New Brunswick. Court of Chancery.

"RULES AND STATUTES

REGULATING THE PRACTICE OF THE

5910

COURT OF CHANCERY IN THIS PROVINCE,

NOW THE

"SUPREME COURT IN EQUITY."

ALSO

RULES MADE IN THE SUPREME COURT

SINCE THE PUBLICATION OF ALLEN'S RULES

IN 1847.

By GEORGE BOTSFORD, Esquire,

BARRISTER AT LAW.

FREDERICTON.

G. E. FENETY, PRINTER TO THE QUEEN'S MOST EXCELLENT MAJESTY.

1865.

S 4 m 18

PREFACE.

The difficulty of ascertaining what the Practice of the Court of Equity now is in this Province, has induced me to offer to the Profession the following collection of the Rules of Court and Statutes relating thereto, in Pamphlet form. The extensive field of enquiry left open by the second Section of Sub-Chapter 1, of 17 Vic. c. 18, precludes my attempting an analysis; and I have therefore given the Rules in extenso, as made from time to time, together with the Acts of Assembly establishing the "Supreme Court in Equity," and regulating its Practice. I have also, for the convenience of reference, included portions of the repealed Acts of Assembly.

As the enactments of the 17th Vic. c. 18, were principally taken from, and are similar in terms to, the Imperial Statutes 15 and 16 Vic. c. 80, "The Master in Chancery abolition Act;" and 15 and 16 Vic. c. 86, "The improvement of Jurisdiction of Equity Act," I have added some decisions of the English Courts under these Statutes, and the consolidated Orders of 1860 where they have appeared to me to be applicable.

In reference to the construction of the 17th Vic. c. 18, by which a Judge may be called upon in any part of the Province where he may chance to be, to entertain or decide matters connected with suits in Court, I have ventured to note doubts entertained by some of the Profession.

I must express my full conviction to the opinion which seems to be gaining ground with the Profession, that the abolition of the Court of Chancery, transferring its jurisdiction to the Supreme Court, and fastening its duties upon the Common Law Judges, was not only a mistake, but inexpedient and prejudicial to the interests alike of suitors and the public at large, and not compatible with the increasing duties and labours of the Common Law Judges.

In 1841, when the Equity jurisdiction of the Court of Exchequer was transferred to the Court of Chancery in England, two additional Vice Chancellors were appointed, and since that time two more Equity Judges, Lords Justices, have been created.

I have included in this collection the Rules of the Supreme Court made since the publication in 1847 by Mr. Allen, now His Honor Mr. Justice Allen.

G. BOTSFORD.

Fredericton, November, 1865.

GENERAL RULES

OF THE

COURT OF CHANCERY.

8th JULY, 1826.

Clerks in Court.

WHEREAS the appointment of persons to be Clerks in the Court, who reside in different parts of the Province, and are remote from the place where the Sittings of the Court are held, has been the occasion of great inconvenience, and has exposed the records and papers of the Court to accident and loss; It is therefore ordered, That all the appointments here tofore made of persons as Clerks of this Court, be and the same are hereby revoked and vacated: And it is further Ordered, that the Register of this Court be the officer in lieu of the Clerks, to transact and file all proceedings by Bill and Answer, and to have the custody of all records, papers and proceedings relating to causes in equity, and to make and sign all office copies thereof, and to enroll the decrees of the Court, and to sign and seal all writs and processes on the Equity side of the Court, and to perform all other such like services which appertained to the office of Clerks of this Court.

29th JUNE, 1827.

Clerks in Court.

IT IS ORDERED, That all the former Clerks of this Court do forthwith deposit with the Register, all Bills, Answers, Pleas, Demurrers and other papers filed and remaining with them as such Clerks, in order to the same being filed gratis with the said Register, in furtherance of the order of this Court of the eighth day of July last.

4th JUNE, 1839.

[Under 2nd Vic. c. 35, A. D. 1839.]

Indorsement of Bills.

1. That all Bills to be filed with the Register be indorsed with the name or firm of the complainant's solicitor or solicitors, who shall file the same, and the title of the suit be entered by the Register in a book to be by him kept for that purpose.

Subpœnas.

2. That the names of all the defendants in a suit may be included in one subpœna to appear.

3. That all subpœnas and other processes of the Court shall be sealed with a seal, to be kept by the Register, on which shall be inscribed the words "Court of Chancery."

4. That the several writs of subpœna shall be in the form mentioned at the foot of these orders, or as near as may be, with such alterations and variations as circumstances may require.

5. That it shall not be necessary to file a præcipe for the subpœna, but that on a subpœna for costs being sealed, the certificate or report shall be produced to the Register, as his authority for sealing it.

Indorsement of Subpœna.

6. That the name or firm of the solicitor or solicitors issuing a subpœna shall be indorsed thereon.

Service of Subpœnas.

7. That the service of subpœnas shall be effected by delivering a copy of the writ and of the endorsement thereon to the person to be served therewith, and at the same time producing and shewing the original writ.

8. That the time of serving any subpœnas (except for costs,) shall be limited to the last day of the term next following the term or vacation in which it issued out.

Appearance.

9. That defendants shall in all cases have thirty days to appear, from the day of service of the subpœna, exclusive of the day of service.

10. That the mode of appearance shall be by filing a note in writing of such appearance with the Register, and by giving a notice thereof to the plaintiff's Solicitor.

Pro Confesso.

11. That in case the defendant neglects to appear in due time after the service of the subpœna, on affidavit of such service and default, an order may be made that the Bill be taken *pro confesso* unless the defendant appear in twenty days from the date thereof exclusive; which order shall be inserted in the Royal Gazette at least ten days before the day limited for the appearance by the said order; and at the expiration of the time so limited, in case no appearance shall have been entered and notice given, the bill may be ordered to be taken *pro confesso*.

Attachment.

12. That it shall in no case be necessary to issue an attachment with proclamations, or a commission of rebellion, but that in case of the return of *non est inventus* to a writ of attachment, the party may at once proceed to a Sergeant-at-Arms.

Copies of Pleadings.

13. That the solicitors of the plaintiff and defendant respectively, shall be entitled to furnish the opposite party with copies of the pleadings of which copies are required to be delivered.

Dismissing Bills.

14. That in case the plaintiff's solicitor neglect to deliver to the defendant's solicitor a copy of the bill filed, within thirty days after the appearance of the defendant shall have been put in and notice given, the defendant may move that the bill be dismissed, which may be ordered accordingly.

Pro Confesso.

15. That the defendant shall have two calendar months, exclusively, to put in a plea, answer, or demurrer, after having been served with a copy of the plaintiff's bill, without any order for such purpose, and in default of so doing on fourteen days' notice of motion given by the plaintiff and motion made in open Court, the bill may be ordered to be taken forthwith *pro confesso*, unless the Court on special circumstances disclosed by affidavit should allow further time; in which case no such order shall be entered until the expiration of the further time allowed.

English Practice.

16. That in all cases where, by the English practice, a different time is allowed or prescribed for the performance of any act in town causes and country causes, and no provision is made for the same by the practice of this Court, the time for the performance of such act shall be the time allowed in country causes, without respect to residence.

Swearing to Answers, &c.

17. That all answers and pleas may be sworn before any one of the Masters in Ordinary or Extraordinary, and that all pleadings, as well as the bill, be filed with the Register and indorsed with the name or firm of the solicitor or solicitors by whom the same are filed.

Amended Answer.

18. That where, upon exceptions to any answer, it becomes necessary to put in an amended answer, in case such amended answer be not put in in due time, it shall not be necessary for the plaintiff to proceed by attachment, but he may give notice of motion that the bill be taken *pro confesso*, unless the amended answer be put in within ten days after the service of such notice; and in case the amended answer be not put in, and a copy delivered within the time, the bill may be ordered to be taken *pro confesso*.

Issue.

19. That the cause shall be considered at issue by the replication and no subpœna to rejoin shall be necessary.

Master's Oath.

20. That the oath to be taken by the Masters in Ordinary, as examiners, shall be in the form prescribed in that behalf in the appendix to these orders, and that the same be administered in open Court, and that the Masters so sworn do subscribe their names, together with the day and year of being so sworn, on a roll to be kept by the Register for that purpose; and that when examiners shall be specially appointed by order of the Court for taking the examinations in any cause under the provisions of the Statute of the 2d Victoria, entitled "An Act for the improvement of the Practice in the Court of Chancery," such person may be either sworn in open Court, or before some person empowered by commission under the seal of the said Court to administer

the oath; and in case the oath be administered in Court, an entry shall be made in the minutes, of the same, and a copy thereof, together with the order by which such person shall have been so appointed, shall be annexed to the copy of the examinations to be by him taken and transmitted therewith; and in case the oath shall be administered under a commission, then such commission, with a certificate indorsed thereon by the Commissioner that the oath has been duly administered, shall be annexed to the examinations and transmitted therewith, which latter oath and certificate shall be in the form prescribed in that behalf in the appendix to these orders, or as near thereto as circumstances may admit.

Witnesses.

21. That no rule to produce witnesses shall be necessary.

Interrogatories.

22. That interrogatories for the examination of witnesses be filed with one of the Masters, and copies thereof delivered to the opposite party, together with notice of the name of the Master with whom the same were filed, within thirty days after replication filed, in which interrogatories shall be specified the names of the witnesses to be examined, and the particular interrogatories to which each witness is to be interrogated.

Cross Interrogatories.

23. That the cross-examination of the witnesses may be conducted either on written interrogatories, to be filed in like manner with the Master, or by interrogatories to be proposed at the time of the examination as hereafter mentioned. And that when the former mode of proceeding is adopted the cross interrogatories shall be filed, and a copy thereof delivered to the opposite party within fourteen days after receipt of a copy of the interrogatories in chief; or in case the party intends to attend and propose cross interrogatories at the time of the examination, then notice shall be given to the opposite party of such his intention within fourteen days after receipt of a copy of the interrogatories in chief.

Examination.

24. That within fourteen days after the expiration of the time for filing cross interrogatories, the Solicitor who filed the interrogatories in chief shall obtain an appointment from

the examiner, fixing the time and place of examination, which shall be served on the opposite party fourteen days, exclusive, before the day of such examination.

Subpœna ad Testificandum.

25. That any number of witnesses may be included in one subpœna *ad testificandum.*

Examination of Witnesses.

26. That when the cross-examination of witnesses is to be conducted by means of interrogatories proposed at the time of examination, Counsel may attend for all parties, and each cross interrogatory shall be committed to writing and submitted to the examiner, who shall then propose the same, and in such case a re-examination in like manner as the cross-examination, and confined to matters arising thereout, shall be permitted to the opposite party, such interrogatories to be afterwards fairly copied, certified by the Master, and annexed to the depositions.

27. That all objections to any interrogatory shall be made at the time the same is proposed, and in such case if the party proposing the same submit to the objection, the question shall not be put, otherwise the same shall be proposed and the answer thereto taken, but at the same time the examiner is to note down the objection in connection with the deposition. He is also to note down in like manner any objection taken to the testimony of the witness, (as being hearsay for instance,) and the validity of all such objections, if persisted in, shall be decided at the hearing, at which time no objection not so made before the examiner shall be permitted.

Filing Depositions.

28. That at the expiration of fourteen days after the day appointed for the examination, the examiner shall transmit the interrogatories and depositions to the Register under seal, unless he shall be of opinion that further time is necessary to take the depositions; in which case he shall defer transmitting the same so long as he may find requisite, and certify his opinion to the Court at the time of transmission.

Publication.

29. That on the depositions being filed with the Register, either party may move for publication, (on six days notice

of motion being given,) which shall be directed to take place forthwith, or at such time as the Court, on sufficient cause shewn by affidavit, shall order.

Dismissing Bill.

30. That in case the plaintiff shall neglect to proceed to file interrogatories for the examination of witnesses, or to obtain an appointment to examine witnesses thereupon in due time, the defendant, on giving fourteen days notice of motion, may move that the Bill be dismissed, which shall be ordered accordingly, unless cause be shewn to the contrary.

Hearing.

31. That notice of bringing a cause on to hearing shall be served on the opposite party, and the cause set down for hearing with the Register fourteen days before the day of hearing; and where publication has been ordered, no cause shall come on to be heard until the expiration of one calendar month from the day of publication.

Subpœna to hear Judgment.

32. That no subpœna to hear judgment shall be deemed necessary.

Dismissing Cause.

33. That if the plaintiff shall set down the cause and give notice of bringing the same on to be heard, and neglect to appear at the hearing, the cause may be ordered to be dismissed.

Dismissing Bill.

34. That if the plaintiff neglect to bring on the cause to a hearing at the earliest period at which, by the practice of the Court, the same might have been heard, the defendant may obtain an order upon affidavit of the state of the cause, and of such default on the part of the plaintiff, that he may be at liberty to bring the same to hearing; and if the defendant shall thereupon serve such order, set down the cause, and give notice to the plaintiff fourteen days before the day of hearing, and the plaintiff shall not appear at the hearing, the bill may be ordered to stand dismissed.

Computation of Time.

35. That when any specified time is, by the practice of this Court, allowed or prescribed for the taking of any step in

the progress of proceedings therein, it shall always be computed exclusively of the day from which such time commences.

Injunction.

36. That in every cause for an injunction to stay proceedings at law, if the defendant do not plead, answer or demur to the plaintiff's bill within ten days after service of a copy of the plaintiff's bill, the plaintiff shall be entitled to such injunction, as of course, upon motion.

Sitting of the Court.

37. That at each term, such day or days shall be appointed for the sitting of the Court, during the ensuing vacation, as the Master of the Rolls shall deem proper, which shall be published in the Royal Gazette on the week next after the term.

Form of Subpœna to appear and answer.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To Greeting:

We command you, (and every of you, *where more than one defendant,*) that within thirty days after the service of this writ on you, exclusive of the day of such service, laying all other matters and excuses aside, you do cause an appearance to be entered for you in our Court of Chancery at Fredericton, to a "Bill" (*or as the case may be,* "Information," *or* of "Revivor and Supplement," *or* "Supplemental Bill,") filed against you by (and others *or* another,) and that you do answer concerning such things as shall then and there be alleged against you, and observe what our said Court shall direct in this behalf, upon pain of an attachment issuing against your person, and such other process for contempt as the Court shall award, and of the said Bill being taken against you *pro confesso.*

Witness His Excellency at Fredericton, the day of in the year of our Reign.

ROBINSON.

Form of Subpœna for Costs.

Victoria, &c. To Greeting:

We command you (and every of you,) that you pay or cause to be paid immediately after the service of this writ,

to or bearer of these presents, £ costs by our Court of Chancery at Fredericton, adjudged to be paid by you to the said under pain of an attachment issuing against your person, and such process for contempt as the Court shall award in default of such payment.

Witness, &c.

ROBINSON.

Form of Subpœna to testify viva voce in Court, or to testify before the Master.

Victoria, &c.

To Greeting:

We command you and every one of you, that laying all other matters and excuses aside, you personally be and appear before His Excellency the Chancellor, (*or* before His Honor the Master of the Rolls,) at Fredericton, *or* before Mr. one of the Masters of our Court of Chancery, at his office in on the day of next, at of the clock in the forenoon, to testify the truth according to your knowledge in a certain suit now pending in our said Court of Chancery, wherein (and others *or* another,) are plaintiffs, and (and others *or* another,) are defendants, on the part of the (*in case of Subpœna duces tecum, add,* "and that you then and there bring with you and produce, &c.") And hereof fail not on your peril.

Witness, &c.

ROBINSON.

Form of Examiner's Oath.

You do swear that you shall well and truly execute the duties of an Examiner of this Court without favor or partiality.

So help you God.

Form of Oath where an Examiner is specially appointed in a particular cause under Statute 2nd Victoria.

You do swear that you shall well and truly execute the duties of an Examiner of the Court of Chancery in a certain cause now depending therein, in which A. B. is plaintiff and C. D. defendant, without favor or partially.

So help you God.

Form of Certificate of Commissioner, that Examiner specially appointed has been duly sworn.

I, E. F., the Commissioner named in the foregoing Commission, do hereby humbly certify that A. B. therein likewise named, was this day duly sworn on the Holy Evangelists well and truly to execute the duties of an Examiner in a cause pending in the Court of Chancery in which A. B. is plaintiff, and C. D. defendant, without favor or partiality.

Dated the day of A. D.

(Signed) E. F.

24TH JUNE, 1839.

[Under 2nd Vic. c. 35, A. D. 1839.]

Order for Appearance.

IT IS ORDERED by His Excellency the Chancellor, by and with the advice and consent of His Honor the Master of the Rolls, that when the defendant is not served with process, and proceedings are to be had under an Act made and passed in the forty eighth year of the Reign of His Majesty King George the Third, intituled "An Act for making process in Courts of Equity effectual against persons who reside out of the Province, and cannot be served therewith," and also an Act in addition thereto, made and passed in the third year of the Reign of His late Majesty King William the Fourth, or either of them, in case the appearance is not entered within thirty days after the last day on which the subpœna issued may be served, under the eighth order of this Court of the fourth day of June instant, the like proceedings may be had as are authorized by the said Acts, or either of them, in case the appearance of the defendant be not entered within the time mentioned and prescribed in that behalf in the said Acts, or either of them, respectively.

5TH MAY, 1840.

[Under 2nd Vic. c. 35, A. D. 1839.]

Appointment of Guardians.

1. That in petitions for the appointment of Guardians in cases where a reference to a Master will be required, no particular specification and description of the real estate, nor

specific inventory of the personal property of the infant be inserted, but the locality of real property and the value of both classes be generally stated.

2. That no copy of such petition be made for the use of the Judge to whom the same shall be presented, unless particularly desired.

3. That no state of facts other than is contained in the affidavits, be laid before the Master to whom the reference shall be made.

4. That the petition to confirm the Master's Report be in the form prescribed at the foot of these orders, or as near thereto as the case may admit.

5. That in cases where it is made to appear on affidavit that the whole property of the infant does not exceed three hundred pounds, a guardian may be appointed on the presentment of the petition, without reference, if the Judge to whom the same is presented shall think fit so to order.

Confirming Reports.

6. That in petitions to confirm Masters' Reports, it shall, in all cases, suffice to advert shortly to the order of reference, and to state the fact and date of filing the Report, without reciting the particulars of such Report.

Petition to confirm Report.

IN CHANCERY.

In the matter of A. B., an infant.

To His Excellency the Chancellor, (*or* His Honor the Master of the Rolls.)

The humble petition of A. B., an Infant, of the age of years,

SHEWETH:

That by an order bearing date the day of A. D. , made on the Petition of your Petitioner, Esq., the Master to whom the matter of the said petition was referred, was directed to make certain enquiries respecting the age, fortune and relations of your Petitioner, and to state what was proper to be allowed for the education and maintenance of your Petitioner; That the said Master hath duly made and filed his Report on the matters referred, bearing date day of , A. D.

Your Petitioner therefore prays that the same may be in all things confirmed, and that such further order may be made in the premises as to Your Excellency (*or* Honor) may seem meet.

And your Petitioner, as in duty bound, will ever pray, &c.

2ND AUGUST, 1842.

[Under 2nd Vic. c. 35, A. D. 1839.]

Performance of Decrees.

1. That no writ of execution nor any writ of attachment shall hereafter be necessary for the purpose of requiring or compelling obedience to any order or decree of this Court, by subsequent process of contempt, but that the party required by any such order to do any act, shall, upon being duly served with such order, be held bound to do such act in obedience to the order.

2. That if any party who is by an order or decree ordered to pay money, or do any other act in a limited time, shall, after service of such order, refuse or neglect to obey the same according to the exigency thereof, the party duly prosecuting such order, shall, at the expiration of the time limited for the performance thereof, be entitled to an order for a Sergeant-at-Arms, and such other process as he hath hitherto been entitled to, upon a return of *non est inventus* to a writ of attachment issued for non performance of a decree or order.

3. That every order or decree requiring any party to do an act thereby ordered, shall state the time after service of the decree or order within which the act is to be done; and that upon the copy of the order which shall be served upon the party required to obey the same, there shall be endorsed a memorandum in the words or to the effect following, viz:—"If you, the within named A. B., neglect to perform this order by the time therein specified, you will be liable to be arrested under the authority of the Court of Chancery, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order."

Writ of Assistance.

4. That upon due service of a decree or order for delivery of possession, and upon proof made of a demand and refusal

to obey such order, the party prosecuting the same shall be entitled to an order for a writ of assistance.

Performance of Decrees.

5. That every person not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause against whom obedience to any order of the Court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause.

Interrogatories.

6. That no special interrogatories be inserted in any bill, but in case any defendant appears to the bill, the plaintiff shall thereupon be at liberty without order, to file such interrogatories as might have been contained in such bill provided this order had not been made, subject to the regulations hereafter prescribed; and such interrogatories, when so filed, shall be deemed and taken to be part and parcel of the said bill.

Answer.

7. That a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto, and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

Interrogatories.

8. That the interrogatories so to be filed under the 6th order, shall be duly entitled in the cause, and shall be in the form or to the effect following, viz:—"Interrogatories to be answered by the several defendants hereinafter specified;" (*or*, by the defendant, *in case there be but one defendant*,) "touching the matters alleged and contained in the bill filed in this cause in which A. B., &c., are complainants, and C. D., &c., defendants:—1st. Whether, &c."

9. That the interrogatories so to be filed, shall be divided as conveniently as may be from each other and numbered consecutively, 1, 2, 3, &c., and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the interrogatories, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively, 1, 2, 3, &c." And with the copy of the bill to be served on any defendant or his solicitor, upon appearing to the bill, shall be served a copy of such of the interrogatories only as such defendant is required to answer, together with a copy of such note, unless such defendant shall, at the time of giving notice of appearance, require to be furnished with a copy of all the interrogatories, in which case a copy of the whole shall be furnished.

10. That the note at the foot of the interrogatories, specifying which of them each defendant is required to answer, shall be considered and treated as a part of the bill; and the addition of any such note or any alteration or addition to such note, or to the interrogatories after the same shall have been filed, shall be considered and treated as an amendment of the bill.

Bill.

11. That instead of the words of the bill now in use preceding the interrogating part thereof, and beginning with the words "To the end therefore," there shall hereafter be used, words in the form or to the effect following, "To the end therefore that the said defendants may, if they can, shew why your orator should not have the relief hereby prayed, and in case of appearing to this your orator's bill, may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct and perfect answer make to such of the several interrogatories hereafter to be filed, as by a note thereunder written, they shall be respectively required to answer,"—And that the prayer of the bill shall immediately follow.

Joinder of Co-Defendants.

12. That in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the

Court as parties to a suit concerning such demand all the persons liable thereto, but the plaintiff may proceed against one or more of the persons severally liable.

Demurrer.

13. That where a demurrer shall be filed by the defendant to the whole bill or to a part of the bill, the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within one calendar month after service of a copy of such demurrer upon him, cause the same to be set down for argument.

Plea.

14. That when the defendant shall file a plea to the whole or part of a bill, the plea shall be held good to the same extent and for the same purposes as a plea allowed upon argument, unless the plaintiff shall, within one calendar month after the service of a copy of such plea upon him, cause the same to be set down for argument, and the plaintiff shall be held to have submitted thereto.

Demurrer and Plea.

15. That no demurrer or plea shall be held bad and overruled on argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

16. That no demurrer or plea shall be held bad or overruled upon argument, only because the answer of the defendant may extend to some part of the same matter that may be covered by such demurrer or plea.

Answer.

17. That a defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer, and that he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

Want of Parties.

18. That where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty within fourteen days after a copy of the answer

delivered to him, to set down the cause for argument upon that objection only. And the purpose for which the same is so set down shall be notified by an entry to be made in the Register's book, in the form or to the effect following, that is to say, "Set down upon the defendant's objection for want of parties." And that where the plaintiff shall not so set down his cause but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties; but the Court, if it thinks fit, shall be at liberty to dismiss the bill.

19. That if a defendant shall, at the hearing of the cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection and therein specified by name or description the parties to whom the objection applies, the Court (if it shall think fit,) shall be at liberty to make a decree saving the rights of the absent parties.

Masters' Reports.

20. That in the reports made by the Masters of the Court, no part of any state of facts, charge, affidavit, deposition, examination or answer brought in or used before them shall be stated or recited; but such state of facts, charge, affidavit, deposition, examination or answer shall be identified, specified and referred to, so as to inform the Court what state of facts, charge, affidavit, deposition, examination or answer was so brought in or used.

21. That when it shall be referred to a Master to take an account of the amount due upon any mortgage, the Master shall annex to his report and refer to therein, a statement shewing the manner in which the amount reported to be due is made up and ascertained, which statement shall be deemed and taken to be a part of the report.

Bills of Revivor.

22. That it shall not be necessary in any bill of revivor or supplemental bill, to set forth any of the statements in the pleadings in the original bill, unless the circumstances of the case may require it.

Petition for Re-Hearing.

23. That in any petition of re-hearing of any decree or order made by any Judge of the Court, it shall not be necessary to state the proceedings anterior to the decree or order appealed from or sought to be re-heard.

5TH JULY, 1853.

[Under 2nd Vic. c. 35, A. D. 1839.]

Parties.

1. Any person seeking equitable relief in any of the following cases may file his Bill in the form and to the effect set forth in Schedule A hereunder written, as applicable to the particular case:—

1st. A creditor upon the estate of any deceased person seeking payment of his debt out of the estate of the deceased.

2nd. A legatee under the will of any deceased person asking payment of his legacy or delivery thereof out of the deceased's estate.

3rd. A residuary legatee or one of the residuary legatees of any deceased person seeking an account of the residue and payment or appropriation of his share therein.

4th. The person or any of the persons entitled to the personal estate of any person who may have died intestate and seeking an account of such estate and payment of his share thereof.

5th. An executor or administrator of any deceased person seeking to have the estate of such person administered under the direction of the Court.

6th. A legal or equitable mortgagee or person entitled to a lien or security for his debt seeking foreclosure or sale, or otherwise, to enforce his security.

7th. A person entitled to redeem any legal or equitable mortgage or any lien seeking to redeem the same.

8th. A person entitled to the specific performance of an agreement for the sale or purchase of any property seeking such specific performance.

9th. A person entitled to an account of the dealings and transactions of a partnership dissolved or expired seeking such account.

10th. A person entitled to an equitable estate or interest and seeking to use the name of his trustee in prosecuting an action for his own sole benefit.

11th. A person entitled to have a new trustee appointed where there is no power in the instrument creating the trusts to appoint new trustees, or where the power cannot be exercised, and seeking to appoint a new trustee.

2. In any case other than those enumerated in Order 1, or in any case in which the Forms in Schedule A are not applicable, the party seeking equitable relief may frame his bill on the like principal as the Forms in the said Schedule.

Amendment.

3. The bill may be amended upon petition, if the Judge to whom the same is presented shall see fit, but every application for leave to amend shall state the nature of the amendment proposed.

4. The eleventh Order of the 2nd August, 1842, is hereby rescinded.

Pretences and Charges.

5. No bill is hereafter to contain those allegations usually known as *Pretences* on the part of the defendant and contrary *Charges*, nor any prayer for answers, nor for the writ of subpœna.

Interrogatories.

6. It shall be no objection to an interrogatory to any defendant that there is no special allegation in the bill warranting the same.

7. When the plaintiff does not think proper to file any interrogatories for any of the defendants, or for any one or more of the defendants, any defendant not interrogated shall be entitled, on being served with a copy of the bill, to the like time for putting in a defence to the bill, if he thinks fit so to do, as if served with a copy of interrogatories.

Subsequent facts.

8, Facts and circumstances which have occurred since the commencement of the suit may be introduced by way of amendment to the bill.

Prayer.

9. The Court may in any case grant such relief as it might

afford under the prayer for general relief, without any prayer for such relief being contained in the bill.

Prolixity.

10. If in any bill hereafter to be filed, or other proceeding in the Court, unnecessary allegations shall be introduced, or needless prolixity occur, the Court in its discretion may direct the Master to disallow in the taxation of costs, any charge in respect of such unnecessary matter.

Witnesses.

11. Where the cross-examination of witnesses is conducted by means of interrogatories proposed at the time of examination, no such interrogatories, and no interrogatory by way of re-examination, are to be signed by Counsel.

Infant's Default.

12. When an infant defendant does not enter his appearance in due time after service of the subpœna to appear, it shall not be necessary to take further proceedings to compel appearance, but on proof of such default, the Court may order that unless the defendant do appear in twenty days from the date of such order, the plaintiff shall be at liberty to prove his case by affidavit; and such order is to be published in the Royal Gazette at least ten days before the day limited thereby for such appearance; and at the expiration of the time so limited, in case no appearance shall have been entered and notice thereof given, upon proof thereof, and of the allegations in the bill, by affidavit and such documentary evidence as may be requisite, the Court may make such decree as it might have made had the case been at issue and duly established in evidence.

13. When an infant defendant has appeared to the bill, and having been served with a copy thereof, makes default in putting in a plea, answer, or demurrer thereto, in due time, the plaintiff may give notice of motion for a day therein named, for a decree to be made upon affidavit, which notice shall be served fourteen days before the day so named, and the Court upon motion made pursuant to such notice, on proof thereof and of the allegations in the bill, in the manner prescribed by Order No. 12, of this date, may make a decree to such effect as is therein provided, unless upon special circumstances disclosed by affidavit it should think fit to

allow the defendant further time for defence, in which case no such decree shall be made until the expiration of such further time.

Pro confesso.

14. In any case when the plaintiff moves to have the bill taken *pro confesso*, the Court may, if it shall see fit, require further proof before making any order or decree therein.

Master.

15. Where a reference is made to a Master, he shall in no case recite in his report the order of reference, or any part thereof, but he shall attach his report to the copy of the order of reference served on him, and the order shall be referred to in the report thus:—"By virtue of the order hereunto annexed, &c."; and the report and copy of order annexed, shall be delivered to the party entitled to receive the report.

Decree.

16. In any case where any preliminary investigation is necessary to a final decree, the Judge before whom the cause comes on, if he shall so think fit, may order and direct the investigation to take place before himself at Chambers, or in open Court, and may prescribe the mode by which the investigation is to be conducted.

Answer general terms.

17. Correspondent with the brevity enjoined in regard to the plaintiff's bill by the foregoing orders, the defendant in his answer is to state matter of defence in general terms as concisely as may be; provided that this order is not to be construed so as in any way to diminish the right of the plaintiff to a full answer to interrogatories.

Meaning of words.

18. In these Orders and Schedules the following words have the several meanings hereby assigned them, over and above their several ordinary meanings, unless there be something in the subject of the context repugnant to such construction, viz:—

1st. Words importing the singular number include the plural number, and words importing the plural number include the singular number.

2nd. Words importing the masculine gender include females.

3rd. The word "affidavit" includes affirmation.

4th. The word "person" or "party" includes a body politic or corporate.

5th. The word "legacy" includes an annuity, and a specific as well as a pecuniary legacy.

6th. The word "legatee" includes a person interested in a legacy.

7th. The expression "residuary legatee" includes a person interested in the residue.

19. These Orders shall come into operation on the first day of September next.

SCHEDULE A.

Forms of Bills.

1. By a creditor upon the estate of a deceased person seeking payment of his debt out of the estate.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that C. D., late of , deceased, was, at the time of his death, and that his estate still is indebted to your orator in the sum of for goods sold and delivered by your orator to the said C. D.; [*or otherwise, as the case may be, and if any security has been given for the debt by any written instrument, then state it thus:* which said debt was secured by a mortgage on certain real estate, bearing date] that the said C. D. died in or about the month of last, and that the defendant E. F. is the executor (*or* administrator) of the said C. D., and that the debt remains unpaid.

Your orator therefore prays payment of his debt, or in default thereof, that the estate may be administered in this Court on behalf of himself and the other unsatisfied creditors of the said C. D., and that all proper directions may be given and accounts taken; and he prays the process of the Court herein.

[NOTE.—This form may be varied according to the circumstances, where the plaintiff is not the original creditor, but has become interested in, or entitled to the debt, in which case the character in which he claims is to be concisely stated.]

2. By a legatee under the will of any deceased person seeking payment or delivery of his legacy out of the testator's assets.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that your orator is a legatee to the amount of £ under the will

dated the day of , of C. D., late of , deceased, who died on the day of , and that the defendant, E. F., is the executor of the said C. D., and that the said legacy, together with the interest thereon from the [*the day mentioned in the will for payment, or the expiration of twelve calendar months after the testator's death,*] is still unpaid, and your orator therefore prays to be paid the said legacy and interest, [*or to have the said legacy and interest appropriated and secured,*] and in default thereof, to have the estate of the said C. D. administered in this Court on behalf of himself and all other the legatees of the said C. D., and for that purpose that all proper directions may be given, and the accounts taken; and he prays the process of the Court herein.

[NOTE.—This form may be varied according to the circumstances, where the legacy is an annuity, or specific, or where the plaintiff is not the legatee but has become entitled to or interested in the legacy, in which case the character in which the plaintiff claims is to be concisely stated.]

3. By a residuary legatee, or any of several residuary legatees of any deceased person, seeking an account of the residue and payment or appropriation of his share therein.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that your orator is the residuary legatee [*or one of the residuary legatees,*] under the will dated the day of , of C. D., late of , who died on the day of , and that the defendant, E. F., is the executor of the said C. D., and hath not paid to your orator the [*or his share of the*] residuary personal estate of the said testator; and your orator therefore prays to have the personal estate of the said C. D. administered in this Court, and to have the said residue [*or his share of the said residue,*] paid him, and his costs of this suit, and for that purpose that all proper directions may be given and accounts taken; and he prays the process of the Court herein.

[NOTE.—This form may be varied according to the circumstances, where the plaintiff is not the residuary legatee, but has become entitled to or interested in the residue, in which case the character in which he claims is to be concisely stated.]

4. By the person or any of the persons entitled to the personal estate of a person who may have died intestate, and seeking an account of such personal estate and payment of his share thereof.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that your orator is the next of kin, [*or of the next of kin,*] accord-

ing to the statutes of distribution of personal estate of C. D., late of , who died on the day of , intestate; and that your orator is entitled to [*or to a share of*] the personal estate of the said C. D., and that the defendant E. F., is the administrator of the personal estate of the said C. D., and the said E. F. hath not accounted for or paid to your orator the [*or his share of the*] personal estate of the said C. D.; your orator therefore prays to have the personal estate of the said C. D. administered in this Court, and to have his costs of this suit, and for that purpose that all proper directions may be given and accounts taken; and he prays also the process of the Court herein.

5. By the executor or administrator of a deceased person claiming to have the estate of such person administered under the direction of the Court.

In Chancery. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator A. B., that your orator is the Executor [*or* Administrator] of E. F., late of , but now deceased, who departed this life on or about , and that he is willing and desirous to account for any part of the estate that has come to his hands, of which he hath possessed a certain amount, and that the whole of the estate of the said E. F. should be duly administered in this Court for the benefit of all persons interested therein or entitled thereto; and that C. D. is interested in the said estate as the next of kin of the said E. F., or as the residuary legatee of the said E. F., [*and in case there is another or other executors or administrators who are not plaintiffs, and are to be made defendants, then add as follows:*] and that the defendant G. H. is also an executor or administrator of the said E. F.; and your orator prays to have the estate of the said E. F. applied to a due course of administration under the direction of this Court, in the presence of the said C. D., [*and* G. H.], and such other persons interested in the said estate as this Court may be pleased to direct, and that the costs of this suit may be provided for, and for these purposes that all proper directions may be given and accounts taken; and he prays also the process of the Court herein.

6. By a legal or equitable mortgagee or person entitled to a lien as security for a debt, seeking foreclosure or sale or otherwise to enforce his security.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that under and by virtue of an indenture, [*or as the document may be,*] dated the day of , and made between [*the parties,*] your orator is a mortgagee [*or an equitable mortgagee*], [*or entitled to a lien upon certain freehold*] [*or leasehold*] property [*or other property as the case may be,*] therein comprised, for securing the sum of £ and interest, and that the time of payment thereof has elapsed, and that the defendant C. D. is entitled to the equity of redemption of the said mortgaged premises, [*or the premises subject to such lien*] and your orator therefore prays to be paid the said sum of £ and interest, and the costs of this suit, and in default thereof he prays the equity of redemption may be foreclosed, [*and to have the said mortgaged premises sold, or to have the said premises subject to such lien sold, as the case may be,*] and the produce thereof applied in payment of his said debt and costs, and for that purpose to have all proper directions given and accounts taken; and he prays the process of the Court herein.

7. By a person entitled to the redemption of any legal or equitable mortgage or any lien seeking to redeem the same.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that under and by virtue of an indenture, [*or other document as the case may be,*] dated the day of , and made between [*the parties,*] your orator is entitled to the equity of redemption of certain freehold [*or other property, as the case may be,*] therein comprised, which was originally mortgaged, [*or pledged*] for securing the sum of £ and interest, and that the defendant C. D. is by virtue of the said indenture the mortgagee [*or by an assignment of the said mortgage dated the day of , the assignee of the said mortgage,*] [*or holder of the said lien,*] and entitled to the principal money and interest remaining due upon the said mortgage, [*or lien,*] your orator therefore prays that he may be allowed to redeem the said property, and that the same may be reconveyed [*or delivered up*] to him, or the mortgage cancelled upon payment of the principal money and interest due and owing upon the said mortgage, [*or lien,*] and for that purpose to have all proper directions given and accounts taken; and your orator prays the process of the Court herein.

8. By a person entitled to the specific performance of an agreement for the sale or purchase of any property seeking such specific performance.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that by an agreement dated the day of , and signed by the defendant, C. D., your orator contracted to buy of him [*or sell to him,*] certain freehold property [*or other property, as the case may be,*] therein described or referred to, for the sum of , and that he has made, or caused to be made, an application to the said defendant, specifically to perform the said agreement on his part, but that he has not done so; your orator therefore prays that the agreement may be specifically performed on the part of the defendant, and to have his costs of this suit, and for that purpose to have all proper directions given; and he hereby offers specifically to perform the same on his part, and he prays the process of the Court herein.

[NOTE.—This form may be adapted to an agreement to lease or to mortgage, with proper alterations.]

9. By a person entitled to an account of the dealings and transactions of a partnership dissolved or expired seeking an account.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that from the day of down to the day of , your orator and the defendant C. D. carried on the business of in co-partnership, under certain articles of co-partnership dated the day of , and made between [*the parties,*] [*or without articles, as the case may be,*] which partnership was dissolved [*or expired*] on the day of ; and your orator therefore prays that an account may be taken of the partnership dealings and transactions, and to have the said partnership wound up and settled under the direction of this Court, and for that purpose that all proper directions may be given and accounts taken; and he also prays the process of the Court herein.

10. By a person entitled to an equitable estate or interest and claiming to use the name of his trustee in prosecuting an action for his sole benefit.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that under an indenture dated the day of , and made between [*the parties,*] your orator is entitled to an equitable estate or interest in certain property therein described or referred to, and that the defendant C. D. is a trustee for your orator of such property, and that being desirous to prosecute an action at law against , in respect of such property, he has made or caused to be made an application to the said defendant, to be allowed to bring such action in his name, and has offered to indemnify him against the costs of such action, but that the said defendant has refused or neglected to allow his name to be used for that purpose; your orator therefore prays to be allowed to prosecute the said action in the name of the said defendant, and hereby offers to indemnify him against the costs of such action; and he prays the process of the Court herein.

11. By a person entitled to have a new trustee appointed in a case where there is no power in the instrument creating the trust appointing the new trustee, or when the power cannot be exercised, and seeking to appoint a new trustee.

IN CHANCERY. To &c. [*address as usual.*]

Humbly complaining, sheweth your orator, A. B., that under an indenture dated the day of , and made between [*parties,*] [*or under a will of , or other document, as the case may be,*] your orator is interested in certain trust property therein mentioned or referred to, and that the defendant C. D. is the present trustee of such property, [*or is the real or personal representative of the last surviving trustee of such property, as the case may be,*] and that there is no power in the said indenture, [*or will, or other document,*] to appoint new trustees, or that the power in the said indenture, [*or other document,*] to appoint new trustees, cannot be executed; your orator therefore prays to have a new trustee appointed of the said trust property in the place of [*or to act in conjunction with*] the said defendant; and he prays the process of the Court herein.

Trinity Term, 19th Victoria, A. D. 1856.

[Under 17 Vic. c. 18, A. D. 1854.]

Appearance of Absent Debtor.

1. Upon any suit being commenced against any defendant, if it shall be made to appear upon affidavit that such defendant doth not reside within the Province, but has a known place of residence without the limits thereof, an order may be made for the appearance of such defendant at a certain day therein named, and a copy of such order shall within one year be served upon such defendant, either personally or by delivering the same at the residence of the said defendant to some adult person belonging to his family, and if such defendant do not appear within the time limited by such order, or such further time as the Court may appoint, the plaintiff shall be entitled to the like decree as in case of non-appearance when the defendant is served with process within the Province; provided that in case the defendant reside in any part of Europe or the West Indies, such service be made three calendar months before the day of appearance; and if such defendant reside in any part of the United States of America, or in any of the British North American Colonies, such service shall be made two calendar months before the day of appearance; and if in any other part of the world, such service shall be made six calendar months before the day of appearance.

2. The proof of such service may be made by affidavit sworn before any Judge of any Superior Court in the country where the same is made, or the Mayor or other Chief Magistrate of any City, Borough, or Town Corporate, in any part of Her Majesty's dominions; provided always, that where the same is sworn in any country not part of Her Majesty's dominions, it shall be authenticated by a certificate under the hand and seal of the British Ambassador, Envoy, Minister, Consul, or Vice-Consul; and if in any part of the British dominions, by a certificate under the hand and seal of a Public Notary.

Admissions in Pleadings.

3. The provisions contained in the fourteenth Section of the second Chapter of the Act relating to the administration of Justice in Equity, are hereby rescinded.

Hearing.

4. The order for hearing the cause in the manner provided for by the fifteenth Section of the last named Chapter of the said Act, instead of the time therein appointed, may be made within one calendar month after the cause shall be at issue, on service of notice and of a copy of the affidavit on which the application is to be made, on the opposite party, ten days before such application, the time for hearing which shall have been previously appointed by the Judge to whom the same is to be made; provided that in cases which are already at issue, the order may be made within one calendar month from the Saturday next after the second Tuesday in the present Term.

HILARY TERM, 23rd VICTORIA.

[Under 17 Vic. c. 18, A. D. 1854.]

Affidavit service.

It is ordered, that it shall not be necessary in any case where a defendant has not appeared, except in applications or notice for an injunction, to serve a copy of any affidavit to be used on any motion or the hearing of any petition on such defendant, unless service shall be specially directed by any Judge; and it shall in no case be necessary to serve the opposite party with a copy of any affidavit of service of process, or of service of any notice or other paper, unless specially ordered.

HILARY TERM, 26th VICTORIA.

[Under 17 Vic. c. 18, A. D. 1854.]

Contempt.

Ordered, that the Clerk in Equity render to each Solicitor during every term, or within ten days thereafter, a statement of the fees due from him to the said Clerk, which are to be paid on or before the first day of the next term, or in default thereof, the Solicitor be considered in contempt.

STATUTES

RECONSTRUCTING THE COURT OF CHANCERY,

AND REGULATING ITS PRACTICE.

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17 VICTORIA, CAP. XVIII.

An Act relating to the administration of Justice in Equity.

Passed 1st *May*, 1854.

CHAPTER 1.

Of the Jurisdiction, Officers, and Practitioners of the Court.

Section.

1. Transfer of Chancery business to Supreme Court.
2. Practice of Supreme Court in Equity, what shall be.
3. Who to make Rules for further regulating same, and how.
4. Business of the Court, how to be conducted, and by whom.
5. Orders and Decrees, how to be carried out.
6. Stated Sittings, when.
7. Master of the Rolls, office of, abolished, &c.
8. Master in Chancery, office abolished; Examiners, how appointed.
9. Solicitors to serve copies of Pleadings and prepare Processes.
10. Commissioners.
11. Clerk in Equity, his duty.
12. Sheriffs and other officers, their duty.
13. Sheriff to serve Processes of Court.
14. Common Gaols, what.
15. Explanation of Terms.

Be it enacted, &c.—1. The Supreme Court (*a*) shall hear and determine in Equity all causes heretofore cognizable by the Court of Chancery, with the like powers and jurisdiction, principles of equity law, and rules of practice, subject to the regulations in the several Chapters of this Title mentioned; and all suits remaining undetermined in Chancery, together with all the rolls, records, and proceedings of the Court, shall be transferred to the Supreme Court, and be there continued and kept; and such suits, with all other causes, be heard, tried, and determined according to the equity jurisdiction hereby established under the name of "The Supreme Court on the Equity side," or "In Equity;" and the said Court of Chancery is hereby abolished except where it may be necessary for the transaction of business in cases of lunacy.

(*a*) Composed of a Chief Justice and three Puisne Judges, who sat always *at Fredericton* during the established Terms of the Court. The Master of the Rolls sits as an additional Judge by virtue of Sec. 7 of this Act, which is the only authority for there being *five Judges now* in this Court.

2. The practice of the Court of Chancery in England prior to the twenty third day of March one thousand eight hundred and thirty nine, to be applied as has heretofore been done in this Province with respect to the practice of the said Court when this Province was erected, together with the existing rules, orders, practice, and fees, as now established in the Court of Chancery of this Province, whether framed or constituted under the authority of any repealed Act of Assembly or otherwise, subject to the provisions of the several Chapters of this Title, and to any modifications of the whole under the next following Sections, shall be the system of proceeding for the said Supreme Court in Equity. (*b*)

(*b*) *Vide* Grant, Ch. Pr. 4th Ed.; Daniell, Ch. Pr. Ed. 1837; and Smith, Ch. Pr. 2nd Ed. for English Practice; also the Rules of Court *ante* and Repealed Statutes, *post* for its modifications.

3. The Court may make, and they are hereby required from time to time to make general rules and orders for carrying the purposes of the Chapters under this Title into effect, and for regulating the times, forms, and mode of procedure, and generally the practice of the Court in respect of the matters to which such Chapters relate, and, so far as may be found expedient, for altering the course of proceeding in the same prescribed in respect of the matters to which this Title relates, or any of them, and from time to time to rescind, alter, add to, and amend the same, as the Judges of the said Court, or a majority of them, may deem necessary.

4. The Court shall always be open, (*c*) and every matter, whether interlocutory or on the hearing of the cause, shall be decided by any one of the Judges, with the same powers as heretofore exercised by the Master of the Rolls, (*d*) subject to appeal; and every appeal from the decision of a Judge, or from any decision of the Court of Chancery made before this Act comes into operation, shall be made to the Court in Term, (*e*) which shall have the same authority and jurisdiction therein as the Chancellor has hitherto had on appeal.

(*c*) The Court of Chancery was always open, 4 Inst. 81. The Legislature probably intended by express words to clothe the "Supreme Court in Equity" with the same power.

(*d*) The M. R. had the same powers as the M. R. in England, except as modified by Provincial enactments, 1 Vic. c. 8. His residence was fixed at the place where the *Court sat*, 2 Vic. c. 37. Fredericton thus became the Westminster of this Province. As to what the powers and duties of the Master of the Rolls were, *vide* the Books of Practice referred to in Note (*b*) *ante*. The M. R., before the passing of this Act, transacted in *open Court* at Fredericton, with the Registrar present to take minutes and file papers, all matters and things not otherwise provided for by the Rules and Practice of the Court, or by Statutes. See as to place of sitting by the M. R. in England, Grant, 18, 34. This Act does not *expressly provide* that

a Judge may *sit at Chambers* for ordinary business, or for the discharge of any of the duties specifically directed by the Acts in a different manner from what the M. R. was authorized to do; nor does it say that each of the Judges in his Common Law Circuits, carries with him the "Supreme Court in Equity" and its "Clerks;" but it does declare that the Terms and Monthly Sittings shall be *at Fredericton*. sec. 6, and that after evidence before an Examiner, &c., *the cause shall be set down for hearing at Fredericton*. See sec. 16, cap. 2. The Act is silent as to *Chambers*. In England, 15 & 16 Vic. c. 80, which abolished the office of Master of Chancery, and imposed further duties on the Judges, the 11 sec. provided as follows: "It shall be lawful for the M. R., and Vice-Chancellor for the time being, and they are hereby required to sit at Chambers for the dispatch of such parts of the business of the said Court as can, without detriment to the public advantage arising from the discussion of questions in open Court, be heard in Chambers, according to the directions hereinafter in that behalf specified or referred to; and the time at and during which they shall respectively so sit shall be from time to time fixed by them respectively."

Sec. 12, provides for Chambers to the Vice-Chancellor's Courts.

Sec. 13, gives same powers and jurisdiction to the M. R. and Vice-Chancellor as if sitting in open Court.

Sec. 14, Orders drawn up at Chambers by the Judge's Clerk or by the Registrar of the Court, who at any time may be required to attend at Chambers

Sec. 15, Orders made at Chambers to have same effect as Orders of the Court of Chancery.

Sec. 16, Specifies what business shall be entertained at Chambers.

Sec. 18, Proceedings at Chambers shall be by summons similar to form adopted by Courts of Common Law sitting at Chambers.

In the absence of any similar provisions in this Act, it would seem more than a violent presumption to infer that each Judge of the Supreme Court, who sits in the place of the M. R., can be called upon in any part of the Province to hold the "Supreme Court in Equity."

(*e*) The four Terms of the Supreme Court at Fredericton are here constituted only as Terms of Appeal, so that during the continuance of these Terms there appears to be no Sittings of the "Supreme Court in Equity," in which the ordinary business to be done in *open Court* can be transacted; the three Terms of the Chancery Court established by 2 Vic. c. 25, s. 2, are abolished, and three of the stated Sittings occur on the same days, sec. 6, *infra*.

5. Every order or decree (*f*) of a Judge shall be entered and carried out by the officers and Solicitors of the Court as the act of such Court, but when the Judge shall be satisfied that an immediate execution thereof may be necessary, the order or decree under his hand, or execution with his allowance thereon, may at once be issued by the Solicitor with the same effect as if a part of the ordinary process of the Court, and the papers shall be filed with the Clerk, and other directions obeyed, as the Judge shall prescribe.

(*f*) No Decree was ever made by the M. R. before this Act, except attended by the Registrar or his Deputy in *open Court at Fredericton*. *Que.* Can a Judge, whose powers are strictly those formerly vested in the M. R., hold the "Supreme Court in Equity" in any other place than Fredericton, and in the absence of the Clerk make a Decree to be entered and carried out by the *officers* of the Court? *Vide* sec. 16 of Sub. Cap. 2, *post*.

6. Besides the ordinary business, (*g*) stated Sittings in Equity shall be held at Fredericton by any one of the said Judges on the first Tuesday in every month in each year, excepting February and September, and instead of February the Sittings shall be on the last Tuesday in January, for the purpose of hearing all motions and causes cognizable in the said Court.

(*g*) Before the passing of this Act, the ordinary business of the Court (except when purely Chamber business) was transacted by the M. R. *at Fredericton*, at one

of the then Terms, or in open Court, on some day fixed by himself on the application of a Suitor, or at one of the Monthly Sittings ordered by him under Rules of Court, p. 12, *ante*. Here again the doubt arises as to what is meant by *such ordinary business*, and whether it can be performed by a Judge in a *different manner* and *place* than formerly was done by the M. R.

7. The Master of the Rolls shall be one of the five Judges of the Supreme Court, both at law and in equity, but his salary as such Judge shall, during his incumbency, be paid in the same manner and to the same extent as when Master of the Rolls, without fees or allowances other than for travelling charges on Circuits; and the office of Master of the Rolls is hereby abolished.

8. The office of Master and Master Extraordinary in the Court of Chancery is hereby abolished, (*h*) and any Barrister who may be at any time appointed by any Judge in any particular cause shall have power to act as an examiner, (*i*) and on being sworn, shall have power to administer the oath to the witness, and take the examination in such cause; the oath to be taken by any examiner shall be taken and administered according to the established practice.

(*h*) For the duties of Masters in Chancery, *vide* 1 Grant 21, and 1 Smith, Ch. Pr. 9. As to providing for the discharge of these duties in England on the abolition of the Office of Master, see Note (*d*) *ante*; by the present Act they would seem to be entirely regulated by Sub. Cap. 3, *post*.

(*i*) The duties of an Examiner are confined to the examination of witnesses, *vide* 1 Smith, Ch. Pr. 29, and 1 Grant, Ch. Pr. 28, also Rules of Court, *ante* 8, 13.

9. The Solicitors of the plaintiff and defendant respectively shall serve the opposite party with copies of all pleadings and writings drawn and filed by them, and may prepare all processes for signing and sealing.

10. The Commissioners for taking affidavits in the Supreme Court shall have similar powers on the Equity side of the said Court.

11. The Registrar (*k*) of the Court of Chancery shall be Clerk of the Court on the Equity side, and shall file and have the custody of all papers, make office copies thereof when required, and entries, sign and seal processes, tax all costs, and draw orders and decrees in Equity; and the said office of Registrar is also abolished, except so far as it may be necessary to act in cases of lunacy.

(*k*) The principal duty of the Registrar was to attend the Court when sitting, take Minutes, and draw up the Decrees, Dismissions, and Orders, &c., *vide* 1 Smith, Ch. Pr. 33, and 1 Grant, Ch. Pr. 27. The Legislature could not have intended by this Section that the Clerk in Equity or Deputy should attend five distinct Sittings of the "Supreme Court in Equity" at the same time in different parts of the Province, to take Minutes, draw up Decrees and Orders, and keep safely all Papers filed therein, or that all the duties of the Registrar should be dispensed with except those set out in this Section.

12. All Sheriffs, Deputy Sheriffs, Coroners, Gaolers, Constables, and other officers, shall be aiding, assisting, and obeying the said Court in the exercise of its jurisdiction, whenever required to do so.

13. The Sheriffs, or if interested, the Coroners, (*l*) shall serve or execute within their respective Counties, any process of the Court that may be sent to them for that purpose, and they shall be entitled to the same fees and emoluments in respect of the same as on the common law side of the Court.

(*l*) One Coroner may act, 26 Vic. c. 16, s. 22, *infra*.

14. The common gaols of the several Counties shall be the prisons of the said Court.

15. Whenever the term "Court" shall be used in any of the Chapters of this Title, it shall mean the "Supreme Court on the Equity side," and when any Judge shall be required to perform any duty under any of the said Chapters, the same shall mean any Judge of the said Court sitting in Equity, (*m*) unless there be something in the context repugnant thereto.

(*m*) In strict accordance with the phraseology of the English Courts these words can scarcely be held to create a new jurisdiction *at Chambers;* and although any one Judge of the Supreme Court sitting in Equity is clothed with all the powers of the "Supreme Court in Equity," except in appeals, yet these powers are limited to such as the Master of the Rolls formerly had, and which he *invariably exercised at Fredericton, and generally in openCourt;* thus an enlarged jurisdiction at Chambers instead of being created, seems to be virtually, if not expressly, negatived by the general provisions of this Act. It by no means follows that a Judge, although sitting as the Supreme Court in Equity, to do *only such things* as the M. R. could have done, can transact them at Chambers without express enactment; see 15 & 16 Vic. Chapters 80 & 86, Imp. Act.

Chapter 2.

Of the General Procedure.

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1. All causes in Equity, except cases of injunction before hearing, shall be commenced by a Summons (A), which shall include the names of all the defendants, be made returnable within forty days from the service, and be served personally, or by leaving a copy thereof with some adult person at the place of residence or business of the defendant, and connected with his establishment; or if a Corporation, may be served on the head officer, secretary, treasurer, cashier, or principal agent; or if out of the jurisdiction of the Court, on any agent or person having charge of property the subject of the suit, or guardian residing in the Province, or on the defendant in person; and the service shall be proved by affidavit. The subpœna heretofore in use on filing the Bill is hereby abolished; and if a Bill be filed with the prayer of injunction the summons shall be issued as above prescribed.

2. No objection shall be allowed to any process or proceeding in the said Court for want of, or mistake in any christian name, or initials thereof, if the party shall be described by the name by which he is usually called or known, or by which he is accustomed to call himself, except when it may be necessary to set out an instrument in its own words.

3. Whenever it shall be made to appear by affidavit to the satisfaction of a Judge, that any person, his heir or executor, against whom any other person hath any equitable right, is out of the limits of the Province, (*a*) and that the applicant hath good *prima facie* grounds for filing a Bill against him, an order may be made requiring the defendant to appear at a certain day therein named, which shall be published in the Royal Gazette,

and shall continue to be published therein for the space of three months thence next ensuing.

(*a*) When defendant has a known place of residence without the limits of the Province, see Rules of Court, p. 31, *ante*.

4. On the expiration of forty days after service of the summons, or of the time limited in the order for appearance, no appearance having been entered, or on the appearance of the defendant and notice thereof served, and within three months therefrom, and in injunction causes without previous summons, the plaintiff shall file a Bill similar to the Form (B), with such variations as each case may require, which shall contain a brief narrative of the material facts on which the plaintiff relies, numbering each allegation as in the said form, adhering as near as may be to the brevity of such form, and concluding with a prayer for specific relief, under which, without a prayer for general relief, he shall have any other relief to which the equities of his case may entitle him. Documentary evidence shall not be inserted at large, but any part of it material to the cause shall be referred to in a concise manner, mentioning in what custody the same may be, if known, for the purpose of reference, or order of production. The Bill shall be sworn (*b*) to by the plaintiff, or by the agent if filed by him, to the best of his knowledge and belief.

(*b*) Not now necessary that Bill be sworn to, *post* 26 Vic. c. 16.

5. In injunction (*c*) causes, if the application is to be supported by any proof other than the sworn Bill, the same shall be done by a short affidavit stating generally the truth of the facts contained in such Bill, or in any of the separate allegations by number, or setting forth any new facts in confirmation of the same.

(*c*) The Bill may be sworn to, but if not, the facts may be proved by affidavit as by the old practice, 26 Vic. c. 16, s. 2.

6. Whenever an injunction may be required before hearing, the same shall be granted only on special cause shewn, and shall be by Order (C), instead of the writ of injunction. Such order may be applied for to any Judge before or after the Bill filed, on notice to the opposite party, and the application may be heard on production of the Bill, before filing, or of a sworn or certified copy thereof after filing, with affidavits, if any. If the injunction be applied for after answer, the answer, or a sworn or certified copy thereof, may be used by defendant as an affidavit. All these papers shall be left with the Judge, or filed under his direction with the Clerk. In cases of immediate

necessity the injunction may be granted in like manner, but without notice, subject to being dissolved or otherwise on sufficient grounds shewn by affidavit on the part of the defendant. The injunction order shall have all the effect of the writ of injunction, and may be dissolved or modified according to circumstances. (*d*)

(*d*) Vide *ante* 12, 32, and Allen's Rules, 110 & 116, *notes*, as to common injunctions. The practice in obtaining common and special injunctions would seem to be assimilated. In England this was done by enactments of 15 & 16 Vic. c. 86, ss. 58 & 59, vide Morgan's Ch. Acts and Orders, 3rd Edn., 220 & 485, also Seton on Decrees, 3rd Edn. 867, *et seqq.* A common injunction can now be obtained in the same way as a special one, (Harris *v* Collett, 26 Beav. 225, *note.*) Although a *prima facie* case, supported by affidavit, is now required to entitle a plaintiff to a common injunction; and although that case is met by defendant's affidavit denying the plaintiff's equity, still the plaintiff will have a right to an injunction to restrain proceedings at law until answer, in order to secure a full discovery in aid of his defence at law, (Senior *v* Pritchard, 16 Beav. 473, marg. notes,) Fitzgerald *v* Butt, 9 Hare, App. lxv, and Lovell *v* Galloway, 17 Beav. 3, where it was said that "in a *bona fide* case, verified by affidavit, shewing the Court that information may be given by the answer of the defendant which may assist the plaintiff in wholly or partially destroying the case made against him at law, the plaintiff in equity is entitled to that discovery, and therefore that in such cases the injunction will be granted until answer," *vide* also (Garle *v* Robinson, 3 Jur. N. S. 633.) It seems therefore that the Court will now act upon the motion for a common injunction as it did formerly, on shewing cause against dissolving, that is to say, it will consider whether there is a fair question to be reserved for hearing, and whether there ought to be an injunction in the meantime, (Magnay *v* The Mines Royal Co. 3 Drew, 130; S. C. 24, L. J. Ch. 413; Fox *v* Hill, 2 De. G. & J. 353, and Harris *v* Collett, *ante.*) When Bill was filed for discovery in aid of defence at law, injunction was refused before interrogatories were filed, (Lovell *v* Galloway, 1 W. R. 118.) But see Harris *v* Collett, and Fitzgerald *v* Butt, *ante*, when the defendants had not appeared, so no interrogatories could be filed. In Fuller *v* Ingram, 7 W. R. 302, V. C. W. held that the Court would, at the suit of the heir at law contesting a will of real estate, restrain the devisee from proving the will in the Court of Probate, until he had put in an answer to a bill of discovery filed by the heir; but that the injunction would not be granted until interrogatories had been filed. When once, however, the interrogatories have been filed, the plaintiff may move for injunction to stay proceedings at law without waiting for an answer, and even before the expiration of the eight days allowed by the old practice, (Lloyd *v* Adams, 4 K. & J. 467, 32 L. T. 240.) The costs of a motion for an injunction on a bill for discovery, (if unsuccessfully opposed,) are payable by the defendant, although he gets the costs of the suit generally, (Lovell *v* Galloway, 19 Beav. 643, S. C. 3 W. R. 156.)

A Company was stayed at the instance of land owner from using a canal reservoir for purposes not contemplated by their Act, (Bostock *v* N. Staf. Ry. 3 S. & G. 283, 7, 290.) All public bodies exceeding or intending to exceed their legal powers under their Acts, are stayed, (Oldaker *v* Hunt, 6 D. M. G. 376, 388, 19 Beav. 485; A. G. *v* Luton, Jur. 1856, 180, 2; A. G. *v* Birmingham, 4 K. & J. 528.) This last case decided that public works ordered by Acts, though for a great Town, must not invade an individual's right to a stream several miles below; and waiting four years to see if the nuisance was permanent was no laches. If plaintiff sustain special damage, bill lies to stay public nuisance without making A. G. party, (Soltain *v* DeHeld, 2 S., N. S. 133; on demurrer and motion, *id* 141, 154, 158. A mortgagee's action against the mortgagor on the covenant to pay, will be stayed if he so deals with the estate that he cannot restore it on payment, (Palmer *v* Hurdric, 27 Beav. 349.) Where injunction is granted till answer, "or further order," it is not dissolved *ipso facto* on a sufficient answer being put in, but remains in force until discharged by Order of the Court, (Ooddean *v* Oakley, 2 De. G. F. & J. 158.) Where plaintiff has obtained injunction on the merits, suppressing material facts, he cannot, on motion to dissolve, support it on the merits then disclosed, (Hilton *v* L. Granville, 4 Beav. 130.) Where injunction is obtained *ex parte*, any material suppression of facts will be a ground for its dissolution, though it seems a plaintiff is not afterwards precluded from making another application upon the real merits, (Fitch *v* Rochfort, 18 L. J., Ch. 458.) Right to an injunction is not superseded by cumulative remedies; *secus* as to mandamus, (Armistead *v* Durham, 11 Beav. 557.)

As to the principles of the Court in granting *ex parte* or interlocutory injunctions —See A. G. *v* Corp, Liverpool, 1 M. & C. 171, 209, 212; Greenhalgh *v* Manchester

Rv. 3 M. & C. 484, 791, 8; Wms. *v* E. Jersey, Hilton *v* E. Granville, C. & P. 91, 283, 292, 4 Beav. 130; Spottiswoode *v* Clarke, 2 Ph. 154; Pinchin *v* L. & Bl. Ry. 5 D. M. G. 851, 866; Gordon *v* Cheltenham Ry. 5 Beav. 237; Pidding & How, 8 Sim. 477; Wood *v* Sutcliffe, 2 S. N. S. 163; and as to delay, or laches, or neglecting remedies, or acquiescing or encouraging the acts complained of, S. Cs.; Buxton *v* James, 5 D. & S. 80; A. G. *v* Eastlake, 11 Hare, 205, 228; and as to the effect of laches on motion, or at the hearing, A. G. *v* Luton, Jur. 1856, 180; and of acquiescence at the hearing, Patching *v* Dubbins, Kay 1.

And for the principles of refusing injunctions on original motion or on appeal, for laches, and the effect of objection or protest—See G. W. Ry. *v* Oxford, &c. 3 D. M. G. 311, 355, 360; and as to effect of protest, A. G. *v* Sheffield & Co. *id* 327; laches applies on information as well as Bill, S. C.; and an injunction was granted four months after a protest against building, Coles *v* Sims, Kay 56, 5 D. M. G. 1; but see Child *v* Douglass, *id* 739.

A party is bound by notice of an injunction granted though the writ is not issued, M'Neil *v* Garratt, C. & P. 98; Vansandau *v* Rose, 2 J. & W. 264; injunction does not bind a person not a party, Iveson *v* Harris, 7 Ves. 256; a person not a party to the suit, acting in contravention of a decree for an injunction of which he had notice, was held bound by it, Harvey *v* Montague, 1 Ver. 57, 122; and a person having notice of an order is bound from the time it is pronounced; or if present when the order is about to be pronounced, Osborne *v* Tennant, 14 Ves. 136; James *v* Downs, 18 Ves. 524. Injunction takes effect from the date of the order, Rattray *v* Bishop, 3 Mad. 220.

In a fit case the Court may still grant an injunction to stay action at law and trial without notice, but this discretion will be exercised with the greatest caution; and when the plaintiff did not apply till the eve of trial, and surprise was shewn, the order obtained *ex parte* was discharged with costs, Larmuth *v* Simmons, V. C. S. 11 Feb. 1854, cited in Seton on decrees, 877; Fisher *v* Baldwin, 1 W. R. 484. In pressing cases injunction may be applied for *ex parte*, but when the defendant has once appeared, he must, as a general rule, be served, Langham *v* Great N. Ry. Co., 1 De. G. & Sm. 486; Perry *v* Weller, 3 Russ. 519; Collard *v* Cooper, 6 Mad. 190; Marasco *v* Boston, 2 Ves. Sen., cited in note to 1 R. & M. 321; except "where the threatened mischief is imminent and would be irremediable," 3 Br. C. C 477, and Allard *v* Jones, 15 Ves. 605. A plaintiff's right to an injunction at the hearing is not necessarily prejudiced by his omitting to apply for it at an earlier stage of cause, Davies *v* Marshall, 9 W. R. 368, but see observations of V. C. Wood, in Betts *v* Clifford, 1 J. & H. 77.

If plaintiff amend his bill, pending notice of motion for injunction, he waives his notice and must pay the costs occasioned by the same, Martin *v* Frost, 8 Sim. 199; Moneypenny *v* ——, 1 W. R. 99, London & Bl. Ry. Co. *v* Limehouse Board of Works, 3 K. & J. 132. If after obtaining injunction plaintiff wishes to amend he usually obtains order without prejudice to the injunction. Under the old practice an order to amend the bill without prejudice to the injunction might in the *case of special injunctions* be obtained of course. In the case of common injunctions it was said in Pratt *v* Archer, 1 Sim. & Stu. 433, (the report of which is corrected in the note to Pickering *v* Hanson, 2 Sim. 448,) a special application was necessary. But see contra Warburton *v* London & Bl. Ry Co., 2 Beav. 253, where the M. R. held that "an order to amend will not prejudice either the special or common injunction, and it would be so whether the words 'without prejudice' were inserted or not," (see too Davis *v* Davis, 2 Sim. 515; Brooks *v* Purton, 1 Y. & C. C. C. 271.) Since the assimilation of the practice, it seems that in all cases where an order to amend has been obtained, the injunction, whether expressly saved or not, is unaffected *unless the record be changed*, Davis *v* Davis, *ante;* Atty. Gen. *v* Marsh, 16 Sim. 572; 13 Jur. 316.

On motion to commit for breach of injunction, personal service must be sworn, Gooch *v* Marshall, 8 W. R. 400. If breach is not wilful, parties will not be committed but ordered to pay costs, Ballen *v* Ovey, 16 Ves. 144, Leonard *v* Attwell, 17 Ves. 386; so where the injunction issued irregularly, Partington *v* Booth, 3 Mer. 149, Drewry *v* Thacker, 3 Swans 546. A party enjoined from doing a certain act, who is afterwards present aiding and abetting it when done, acts in breach of the injunction, St. John's Col. *v* Carter, 4 M. & C. 497. Though an injunction does not embrace "servants and agents," if an agent knowingly aids in the breach, he may be committed for contempt, L. Wellesley *v* E. Mornington, 11 Beav. 180; Jur. 1848, 357; an order was made to commit the members of the Croydon Board of Health individually, for breach of injunction issued against the Board generally, Cumberland *v* Richards, by M. R. 8 June, 1859.

7. If the defendant in any suit appear, (*e*) a copy of the Bill shall be served on his Solicitor, with a copy of the interrogatories (D), which shall then be filed as part of the plaintiff's

Bill; the interrogatories to be founded on the allegations therein contained, and numbered in the same manner as such allegations. If no demurrer, plea or answer be filed, (*f*) and a copy thereof served on the plaintiff's Solicitor within one month from such service, or if a Bill be filed for want of appearance, any Judge at any monthly sitting may be moved on affidavit of the facts, and on fourteen days notice given to the Solicitor in case of appearance, and to the defendant (*g*) if within the jurisdiction, in case of no appearance, to take the said Bill *pro confesso*, and the same shall be so ordered without further order or proof, (*h*) unless the defendant produce the certificate of the Clerk, that an appearance, or answer, as the case may be, has been filed before motion made; and the Judge may, on cause shewn by affidavit, grant further time to put in an answer or demurrer, or for the defendant to appear and plead.

(*e*) As to mode of appearance, see *ante*, p. 6.

(*f*) In a suit where debt or damages only are sought, defendant may file with the Clerk of the Court an offer in writing to consent to judgment by default for a certain sum to be entered of record, &c., 18 V. c. 9, *post*.

(*g*) No notice now necessary when defendant has not put in an appearance. 26 Vic. c 16, *post*.

(*h*) The *Order* itself to take the Bill *pro confesso* is quite distinct from the *decree* of the Court upon the state of facts by the order made evidence; and by the English practice, as adopted by this Court, see *ante*, p. 34, the plaintiff could not get any decree of the Court, either *pro confesso* or otherwise, without the appearance of a defendant if residing within the jurisdiction of the Court, and unless the case could be brought within the provisions of 1 Wm. 4, c. 36, which directs an appearance to be entered for the defendant upon his being taken into custody and brought into Court, the plaintiff would be remediless, and all the plaintiff could do would be to proceed by process of contempt to a sequestration, 1 Smith, Ch. Pr., 139, 152, 1 Daniel, 687, 1 Grant, Ch. 157. For proceedings after appearance by defendant, *vid id.* This practice was modified and changed by our Provincial Acts and Rules of Court, *vide* Rules, *ante*, pp 7, 14, 24, and Repealed Statutes, *post*.

In cases of Bills filed for discovery, and when the answer of the defendant alone can meet the requirements of the plaintiff's Bill, it would be useless to take the Bill *pro confesso* under this Section; and the only course left would be for the plaintiff to proceed by *process of contempt* to sequestration, which proceeding would seem still open to a plaintiff in all cases as before the passing of this Act.

Although this Section of the Act authorizes an *order pro confesso* to be made without any appearance being entered at all, or without any process of contempt being taken against a defendant; it still leaves open the question of the *time and mode* of making a *decree* on the state of facts in the plaintiff's bill. In the repealed Statutes, *post*, 48 Geo. 3, c 2, and 3 Wm. 4th, c 19, where provision was made to order the Bill to be taken *pro confesso*, the following words were used, "may order the plaintiff's Bill to be taken *pro confesso*, and make such *decree* thereon as shall be thought just and proper, and may thereupon issue process to compel," &c. In 2 Vic c. 35, s. 6, *post*, the words are "the Bill may be ordered to be taken against him as confessed, subject nevertheless to such regulations and restrictions as may be authorized and provided in that behalf by the Rules and Orders of the said Court," vide *ante*, pp. 7, 14, 24, as to such Rules and Orders. It would appear as if the Legislature by expressly repealing the above mentioned Acts, and not including any similar provisions in this Act, either intended that the *decree* upon such order *pro confesso* should be obtained under the English practice as then prevailing, or the *practice* constituted under the authority of the repealed Statutes, vide *ante*, p 34, and repealed Statutes, *post*.

The Chancery Orders and Rules in England provides that no cause in which an Order is made that a Bill be taken *pro confesso* against a defendant shall be

heard on the same day on which the Order is made, but the cause shall be set down to be heard, and the Court, if it so think fit, may appoint a special day for the hearing thereof. The defendant may appear at the hearing, and if he waives all objections to the Order, may argue the case upon the merits as stated in the Bill.

Upon the hearing of a cause, when the Bill has been ordered to be taken *pro confesso*, such decree shall be made as to the Court shall seem just, *vide* Morg. 461.

As to the meaning of the words "make such decree thereon as shall be thought just," *vide* Collins *v* Collier, 3 Beav. 600; and the remarks on that case in Haynes *v* Ball, 4 Beav. 101, from which it appears the plaintiff cannot "take such decree as he can abide by." So when a foreclosure suit was taken *pro confesso* against defendant who did not appear at the hearing, it was held that the plaintiff was only entitled to the usual decree against them, and not to an immediate decree for absolute foreclosure. (Brierly *v* Ward, 20 L. J. Ch. 46.) confirming Stanley *v* Bond, 6 Beav. 421, and Hayes *v* Brierley, 3 Dr. & Wor. 274, there cited, and Simmonds *v* Palles, 2 J. & L. 489; Loyd *v* Loyd, 2 Con. & L. 592; and where defendant made default but the plaintiff appeared to have no equity, the bill was dismissed. (Speidall *v* Jarvis, Dick 632.) Morg. 462.

Whatever power the Court may have under this Section to proceed with the decree at once for foreclosure, on the motion to take the bill *pro confesso*, it is quite clear from the first Section of Sub. Cap. 5 of this Act, *post*, that it would not in foreclosure suits, without notice given to the opposite party, assess damages and decree a sale; which notice might be given with that for *the hearing*. This is further provided for by sec. 7 of 26 Vic. c. 18, *post*, wherein it is enacted that when a Bill for the foreclosure of a mortgage is taken *pro confesso* for want of appearance, the Judge may assess the amount due, &c. without notice to the defendant, unless the defendant apply for reference to a Barrister.

8. If the defendant proceed to answer the said Bill, which he may do whether required or not, (*i*) it shall be similar to the Form (E), with such variations as in each case may be necessary, and he may include therein any matter material to his defence. Documentary evidence shall only be referred to in the answer in the same manner as in the Bill, except it be necessary in order fully to answer the interrogatories. (*k*) No demurrer or objection shall be permitted for want of parties or of form; but defects in any Bill, or in the form of any plea, may be submitted to any Judge, who may order an amendment if he deem it necessary, on such terms as to costs or otherwise as he may think just.

(*i*) A case of considerable importance as to voluntary answers has been lately decided by V. C. Stuart, with reference to the necessity of pleading the Statute of Limitations, where no answer is required. (Holding *v* Barton, 1 Sm. & G. App. xxv.) It would seem from this case that even under such circumstances the defence of the Statute cannot be pleaded at the Bar. But it may be raised *by affidavit*. (Snead *v* Green, 10 W. R. 36; 5 L. T. N. S. 302, M. R.; and see in the case of claims, Sneed *v* Sneed, 20 L. J. Ch. 630, and Lincoln *v* Wright, 4 De G. & J. 16; 5 Jur. N. S. 1142; 7 W. R. 350, where no answer having been put in, the defendant was allowed to plead the Statute of Frauds at the hearing.) Morg. 164.

(*k*) The answer, even under the new practice, must traverse with accuracy such parts of an interrogatory as are not intended to be admitted. (Patrick *v* Blackwell, 17 Jur. 803, where V. C. Wood said, that he did not see why under the new Orders the old form of answering should not be followed.) And every interrogatory founded on a specific averment must be specifically answered. Earp *v* Lloyd, 4 K. & J. 58.) But when substantial information has been given by the answer, though not technically, exceptions will be discouraged. (Reade *v* Woodroffe, 24 Beav. 421.)

A son was interrogated, in respect of a purchase from his father, with whom he had been living, which was impeached by the Bill as fraudulent, and without consideration; as to his own pecuniary resources, whence derived, and the amount, value and income thereof; and also out of what proceeds, &c. he had obtained the means of paying the consideration money. To the first interrogatory he answered

that he had pecuniary resources of his own, partly arising from property of his own and partly his wife's, without stating the value. To the second, that he had paid £4000 by money belonging to him, and at the time in his father's hands, and the remaining £7000 by a cheque on his banker. Upon the circumstances charged in the Bill it was held that the answers to both interrogatories were insufficient.—Newton *v* Dimes, 30 L. T. 30.

In a suit to restrain the alleged infringement of a patent, the defendant is not bound to answer interrogatories assuming the infringement, nor to protect himself from giving such discovery by answer is he bound to put in a plea. Delarne *v* Dickson, 3 K. & J. 388.

But generally the rule that a defendant, if he answers at all, must answer fully, does not apply when the matter of discovery is immaterial. Wood *v* Hitchings, 3 Beav. 504; Marsh *v* Keith, 1 Drew. & Sm. 342; Read *v* Woodroffe, *ante*, Morg. 434.

9. The defendant in any suit may, after putting in a sufficient answer, (*l*) and within fourteen days after issue joined, without any bill of discovery, file interrogatories for the examination of the plaintiff on such points as shall arise out of the defendant's answer, and for the purpose of proving the same, and disproving the plaintiff's case, and deliver a copy thereof to the plaintiff's Solicitor, which shall be answered by the plaintiff in like manner and under the same rules of practice, as defendants are bound to answer plaintiffs' Bill.

(*l*) As to the meaning of these words, see Lafone *v* Falkland Islands Co., 2 K. & J. 276, (where it was held that they signify an answer to which no exceptions had been filed.) and Sibbald *v* Lowrie, cited in a note to above case, where the Lords Justices of Appeal allowed interrogatories to be filed under a similar Section of 15 & 16 V. c. 86, although the six weeks allowed to the plaintiff for excepting had not expired, subject to the plaintiffs right to move to take them off the file with costs, if the answer was found insufficient. But see the later case of Walker *v* Kennedy, 26 L. J. Ch. 397; 3 Jur. N. S. 481; 5 W. R. 396, where the Court held that although the defendant might proceed before the expiration of the time allowed to file exceptions to his answer, the plaintiff ought to be allowed time to look into the answer to see whether it were sufficient. When exceptions to an answer are neither allowed nor disallowed, but simply ordered to stand over till the hearing, the defendant cannot, without special permission, file interrogatories. (Merten *v* Haigh, 1 Jo. & H. 231; 6 Jur. N. S. 1258; 9 W. R. 12; 30 L. J. Ch. 33; 3 L. T. N. S. 365.

When relief is required a cross bill will still be necessary. Morg. 174, *note* (*y*).

10. Exceptions (*m*) to the answer, or to the plaintiff's answer to interrogatories filed as aforesaid, shall be submitted to a Judge for determining as to their sufficiency, within fourteen days from the service thereof, and if not the answer shall be held good.

(*m*) The practice in exceptions to an answer at the time of passing this Act was, that after the exceptions had been filed with the Clerk, the Court, upon motion or petition of course ordered a reference to a Master, whose report might be excepted to by either party, when the exceptions would be regularly set down for hearing, &c. This Act makes no provision as to the *mode or manner* of the submission to a Judge, and the Act would seem to intend in this, as well as all other similar provisions, that the reference to a Judge was in fact a reference to the "Supreme Court in Equity," which Court could only proceed with "the like powers, jurisdiction, principals of Equity Law and Rules of Practice," (*ante*, p. 33), as were formerly exercised by the Court of Chancery presided over by the Master of the Rolls, being by motion and hearing in open Court after notice, when not expressly provided to the contrary.

11. Impertinence in any of the proceedings in any equity cause shall not be excepted to, but a Judge may, on applica-

tion, direct the costs incurred thereby to be paid by the party introducing the same. (*n*)

(*n*) The same reasons apply to this Section as to the previous one. The Imp. Stat. 15 & 16 Vic. c. 86, s. 17, from which this seems to have been collated, proceeds as follows:—"The practice of excepting to bills, answers and other proceedings in the said Court for impertinence, shall be and the same is hereby abolished; provided always, that it shall be lawful for the *Court* to direct the costs, occasioned by any impertinent matter introduced into any proceeding in the said Court, to be paid by the party introducing the same, upon application being made to the Court for that purpose."

12. All answers, pleas, disclaimers, and examinations, shall be taken without commission or other formality than is required in the swearing and filing of an affidavit; and all returns to commissions or other documents shall be engrossed on paper, subscribed by the persons to whom directed, and delivered by the Solicitor to the Clerk, enclosed in a sealed envelope; which may be opened by the Clerk, and used without proof of such signatures.

13. All answers, pleas, disclaimers, examinations, declarations, and acknowledgments, if made or taken out of the jurisdiction of the Court, may be taken and the oaths administered as in cases of affidavits, and may be returned in like manner as in the last preceding Section; of which, and of the names subscribed to the same, judicial notice shall be taken.

14. After the cause shall be at issue, and before proceeding to proof or to hearing, any Judge, on ten days notice by either party, shall determine what allegations on both sides are admitted by the pleadings, and shall direct the proof to take place on the allegations not admitted; and if the evidence be taken in the usual manner before an examiner, the time for that purpose shall commence to run from such direction. (*o*)

(*o*) This Section has been entirely repealed, and that part of the following one which refers to the hearing, amended by Rule of Trinity Term, 1856, *ante* pp. 31, 32. See also 26 V. c. 16, s. 6, *post*, as to hearing of a cause and taking *viva voce* evidence at one of the monthly Sittings, or at any Circuit Court after issue by replication.

15. All cases in Equity may, after issue, and at the time when the Judge shall settle the points admitted or denied by the pleadings, be ordered to be heard at such time as may be appointed either by evidence taken *viva voce* in open Court before the Judge at one of the monthly sittings, or at any Circuit Court where the majority of the witnesses reside, if the parties desire the same, or the Judge shall so order; and if at any Circuit Court, such causes shall be entered at the foot of the Common Law cases, and heard after the Jury

is discharged, the Clerk of the Circuits attending himself or by deputy. The Judge may reserve his decision after full hearing of the case, to be delivered at such time as he shall then or afterwards appoint. Subpœnas for attendance of witnesses in such causes, may be issued by the Solicitors of the parties, and shall be served and obeyed as heretofore in the Court of Chancery, with such alterations in the form as may be required.

16. When evidence shall be taken before an examiner, or plaintiff proceeds after issue on evidence furnished by the answer, or the defendant on evidence furnished by the plaintiff's Bill, or his answer to defendant's interrogatories, it shall not be necessary to move for publication; but on fourteen days notice by either party, the cause may be set down for hearing at Fredericton, and the evidence may be used, without delivering out copies thereof at such hearing. (*p*)

(*p*) This Section repealed and re-enacted, leaving out only that part referring to plaintiff's bill. 26 V. c. 16, s. 3.

17. Any Judge shall on the application of either of the parties in any suit, and on good cause shewn, make an order for the production upon oath (*q*) of such of the documents in their possession or power relating to the matters in question in the suit, and deal with the same when produced, as shall appear just; but demand shall first be made of copies of the same or of portions thereof, and be shewn to have been refused.

(*q*) This Section seems to have been collated from ss. 18 & 20 of Imp. Act 15 & 16 V. c. 86, and has reference to one of the objects which by 15 & 16 V. c. 80, s. 26, are expressly made determinable at *Chambers*. Under the old practice, production of documents was obtained on special motion in Court with notice grounded on admissions in defendant's answer. Wigram on Discovery, 200, 2nd Ed.; 1 Grant, Ch. Pr. 204; and the question again presents itself here as to the intention of the Legislature in using the term *Judge;* if they intended the "Supreme Court in Equity," represented by any one of the Judges, and sitting in *open Court*, the proceedings would necessarily be governed by the same practice as guided the M. R. in the Court of Chancery; but if on the other hand they intended a Judge sitting at Chambers, or in any part of the Province where he might be, then would arise a difficulty as to the mode of proceeding, no course having been pointed out by the Act itself; or any Rules or Orders made by the Court under sec. 3, cap. 1, *ante* 34. On either construction of this Section, the following cases, collated from Morgan & Seton, will be found useful. The plaintiff, without filing any affidavit, may compel the defendant (or *vice versa*) to make an affidavit, the form of which has been settled by the Court, (see Form I at the end of this Chapter) as to the documents in his possession; Rochdale Canal Co. v King, 15 Beav. 81; nor will delay in making his application, (9 Hare, App. xix, *note*), nor the fact that the defendant has answered the plaintiff's interrogatories as to documents, and that his answer has not been excepted to, deprive him of his right. Manby v Bewicke, 27 L. T. 55; Quinn v Ratcliffe, 9 W. R. 65; 6 Jur. N. S. 1327; 3 L. T. N. S. 313.

In a proper case the Court will make the order upon the admission in the defendant's answer or affidavit; but not upon the oath of any other person other than the defendant himself; Lamb v Orton, 1 Drew 414; 22 L J. Ch. 713; where plaintiff moved on his own affidavit that the document was in the possession of the defendant, but which was denied by the defendant's answer, the Court refused the

motion. *ib.* In Wing v Harvey, 1 Sm. & Gif. App. x, and 17 Jur. 481, the Court refused a motion by the plaintiff for the production of documents, which the plaintiff's Solicitor in his affidavit alleged to be of importance to the cause.

A plaintiff's right to production of documents rests on the same grounds as his right to a discovery generally; Swinborne v Nelson, 16 Beav. 416; Clegg v Edmondson, 22 Beav. 125, 137; but see Quinn v Ratcliffe, *ante*, and Rumbold v Forteath, 3 K. & J. 44. The rule therefore as to privileged documents is unaffected by this Section. See Rajah of Coorg v East In. Co. 25 L. J. Ch. 345; 2 Jur. N. S. 407; Devaynes v Robinson, 20 Beav. 42; Lafone v Falkland Is. Co., 27 L. J. Ch. 25; Betts v Menzies, 26 L. J. Ch. 528. Nor is the defendant obliged to produce documents in his possession relating *exclusively* to his own title. Sutherland v Sutherland, 17 Beav. 209; Cf. Clegg v Edmondson, *ante;* Lind v Isle of Wight Fer. Co. 8 W. R. 510; 2 L. T. N. S. 503; Bishop of Winchester v Bowker, 9 W. R. 404; Felkin v Lord Herbert, 9 W. R. 756; Howard v Robinson, 4 Drew. 522; the principle of which decision seems to be that a party must not only shew that the documents in question relate to his title, but that they do not relate to the plaintiff's. Under old practice, see Adams v Fisher, 3 M. & Cr. 526; Lancaster v Evors, 1 Phil. 349; Wig. on Dis. 91. Though the defendant may not be compellable to produce such documents, he cannot in any case, it seems, decline to make the common affidavit as to documents. Rumbold v Forteath, *ante.* So when the defendant swore that he had no documents in his possession but such entries as might be contained in the books of his firm, which he objected to produce, stating that they were only in his possession jointly with another who was not a party to the suit, the Court required him to file an affidavit shewing the number and particulars of such documents. Lazarus v Mozley. 5 Jur. N. S. 1119; 35 L. T. 3. Nor will the Court allow the defendant to decide for himself as to the relevancy of the documents in question, at least if a *prima facie* case of relevancy is made out. Caton v Lewis, 22 L. J. Ch. 946; and see Bowes v Fernie, 3 M. & C 632; Mansell v Feeney, 9 W. R. 610; 4 L. T. N. S. 437. Thus, when the defendant sealed up part of the documents ordered to be produced, denying the materiality of such parts on oath, the Court ordered production of the passages concealed. Caton v Lewis, *ante.* In a similar case the Court inspected the sealed passages for itself. Lafone v Falkland Is. Co. 27 L. J. Ch. 25. A plaintiff, as a general rule, has a right to inspect all documents in the defendant's possession, which will assist his case; and the right is extended even to mortgagors; though generally a mortgagee is not compellable to produce his deed except upon payment of principal, interest, and costs. Howard v Robinson, *ante;* 5 Jur. N. S. 136; 28 L. J. Ch. 671; 7 W. R. 223. But a prior mortgagee has no right to see the deed of a subsequent mortgagee. *ib.* Letters passing between co-defendants are not privileged. Betts v. Menzies, *ante.*

The tendency of later decisions has been to treat all confidential communications between a Solicitor and his client as privileged, even though no dispute had arisen at the time they were written. Ford v DePoutes, 7 W. R. 299, M. R.; Lawrence v Campbell, 4 Drew, 485; 7 W. R. 299; compare the earlier case of Walsingham v Goodricke, 3 Hare, 122, and the authorities there cited. But see Marsh v Keith, 1 Drew, & S. 342; 9 W. R. 115; Bluck v Galsworthy, 2 Gif. 243; Telford v Ruskin, 1 Drew, & Sm. 148. The privilege is confined to communications made to the Solicitor by the client; Thomas v Rawlins, 5 Jur. N. S. 667. The Solicitor cannot insist upon the privilege if the client does not object; Re Cameron's C. Ry. Co., 25 Beav. 1. As to Agents, see Steele v Stewart, 1 Ph. 471; Carpmael v Powis, *id* 687. An arbitrator cannot be compelled to produce papers drawn up for his own guidance; Ponsford v Swayne, 4 L. T. N. S. 15; 1 Jo. & H. 33. But see the case as to the privileges of arbitrators generally. The Court refused to order production of documents pawned before the institution of the suit; Lidd v Norton, Kay, App. xi; 23 L. J. Ch. 169; and see Re Williams, 7 Jur. N. S 523; North v Huber, 7 Jur. N. S. 767. But a Solicitor's lien is no defence against production; Hope v Liddle, 20 Beav. 438; s. c on appeal, 7 DeG. M & G. 331; 24 L. J. Ch 691; 1 Jur. N. S. 665; Gaskell v Chambers, 28 L J Ch 388; but see Re Gregson, 26 Beav. 87; nor undertaking entered into with another person not to part with them; Penkethman v White, 2 W. R 380. A plaintiff cannot enforce discovery of documents in the possession of defendant's agent, being the private property of the agent; Colyer v Colyer, 9 W. R 452; 4 L T N S. 134. The later cases on the production of documents are Gandee v Stansfield, 4 DeG. & J. 1; 7 W. R. 321; Wynne v Humberstone, 27 Beav. 421; 28 L J Ch 931; on appeal, 32 L T. 306; Cf. Greenwood v Greenwood, 6 W. R. 119; Peile v Stoddart, 1 M. & G. 192; De la Rue v Dickinson, 3 J & K 388; Bates v Christs Cd 26 L J. Ch. 449; Hampson v Hampson, *id* 612.

It was doubted whether the Imperial Act applied to a Corporation answering under Seal; Law v Indisputable Life Policy Co, 10 Hare, xx; but it is now settled that where production of documents is required from a Company, the Secretary or some other officer shall make an affidavit The Clerk of a Company making affidavit that the documents were in the custody of the Warden and Court of Assistants, and that without their leave he had not access to them, but not stating that he had

asked leave and been refused, had to make a further affidavit. A. G. v Mercer's Co., 9 W. R. 83; 3 L. T N. S. 438, V. C W; see also Ranger v Great W. Ry. Co, 4 DeG. & J. 74; 28 L. J. Ch. 741; 5 Jur N. S. 1191. It had been previously held that documents could not be obtained from the Secretary of a Company unless he was made a defendant. See also Chaffers v Woolner, 30 L. T. 126; and Gaskell v Chambers, 28 L. J Ch. 38-; 26 Beav. 303.

To obtain production of a document the applicant must shew that he has an interest in it, *i. e.* that he requires its production for the legitimate purposes of the litigation in which he is engaged with the adverse party; and that it is or may be evidence which may prove, or lead or assist him to prove his case; and these points must be admitted by the answer (or affidavit) of the other party. A. G v Thompson, 8 Hare, 106.

Where the defendants admitted that they had had an interest under a settlement, but alleged that by subsequent deeds that interest had determined. they had to produce the settlement. Bugden v South, Jur (57) '83

The order to produce is in the form that the plaintiff, his Solicitor, or Agent, may be at liberty to inspect and prove the documents so produced, and to take copies thereof, and abstracts or extracts therefrom as he shall be advised, at his own expense. Dan Ch Pr. 3rd Ed 963

The common order does not authorize inspection by a non-professional relation of the plaintiff, although alleged to be the only person conversant with the accounts to be inspected; and the Court in such a case refused to make a special order authorizing inspection by such person. Summerfield v Pritchard, 17 Beav. 9; 17 Jur. 361 In Draper v The Man Shef. & Lin. Ry. Co, 6 W. R. 117; 6 Jur. N. S. 1239; 30 L J. Ch. 95; 3 L T. N. S. 402, however, V. C. Stuart held that the usual order for inspection authorized the employment of a professional accountant as agent; but on the case being brought before the Lords Justices, 9 W. R. 215; 30 L J Ch. 236; 7 Jur. N S 86, by way of appeal from an order to commit the defendant's Solicitor for refusal to allow inspection by the accountant, it was held that the accountant's connection with a rival company was in that particular case a personal disqualification for the office of agent to inspect. Lord Justice Turner added that, though it might not be necessary that an agent for the purposes of inspection should be a *legal* agent, still he must be a *general* agent, and not an agent appointed for the special purposes of the particular case. In the argument, the unreported case of Coleman v West Hartlepool Harbour Co, Aug 1, 1860, V. C. W. was referred to In a more recent case of Bonnardet v Taylor, 1 J. & H. 383; 3 L T. N. S 881; 9 W. R. 452; on a special application, and a special case being made out for it, V. C. Wood allowed an accountant, who had been named for that purpose, and to whose appointment no reasonable objection could be urged, to inspect the documents The Section does not authorize inspection by a co-defendant; Bartlett v Bartlett, 1 Drew, 233; nor as a general rule by witneeses; Groves v Groves, 2 W. R 36; Kay, App. xix; 23 L J Ch. 199

When the plaintiff obtains an order for production and inspection of documents, he does so upon an implied undertaking not to make public any information so obtained, or to communicate such information to persons not parties to the suit; and the Court would grant an injunction to restrain him from so doing. Williams v Prince of Wales Ass. Co, 23 Beav 338; 3 Jur. N. S. 55. See too Reynolds v Godlee, 4 K. & J. 88, and Enthoven v Cobb, 5 DeG & Sm. 595; on appeal, 2 DeG. M. & G. 632

As soon as the purposes of discovery are answered they will be ordered to be redelivered to the producing party; Dunn v Dunn, 3 Drew, 17; 18 Jur. 1068; affirmed on appeal, 7 DeG. M. & G. 635; 1 Jur. N. S. 122.

A defendant cannot compel plaintiff to produce a document produced to him by another defendant in the absence of the latter; Reynolds v Godlee, *ante*.

18. Whenever an issue may be found necessary to aid the Judge on the hearing, the same may be ordered by him, and shall be tried, and be subject to a new trial, in the ordinary manner in the Supreme Court. If it be necessary for the purposes of an injunction to have the legal right of any party tried forthwith, the application for the injunction shall be suspended, and the Judge may make an order requiring the Sheriff to summon a Jury before him or some other Judge at a time and place therein to be named, and such Jury shall be summoned by the said sheriff, and shall attend

and try the said issue, and witnesses may be subpœnaed, and all other necessary things may be done in the same manner, and under the like penalties and privileges as in cases of ordinary civil trials by Jury, with the right to a new trial as in other cases. If the legal right or title of the party seeking relief can be established under the evidence, or if a case be required to be stated, for the opinion of the Court, without the aid of a Jury, the Judge may determine such right or title, or the point arising for such case, instead of stating the same. And whenever any issue, or question of law, may be determined according to the practice, the Judge shall proceed to the hearing of the said injunction, or the cause, as the case may be, and decree accordingly. In any of these cases the Clerk or his deputy shall attend.

19. No defendant in any Equity suit shall be permitted to object for want of parties, in any case to which the following Rules extend:—

Rule 1.—Any residuary legatee or next of kin may, without including the remaining residuary legatees, or next of kin, have a decree for the administration of the personal estate of a deceased person.

Rule 2.—Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without including any other legatee, or person interested in the proceeds of the estate, have a decree for the administration of a deceased person.

Rule 3.—Any residuary devisee or heir may, without including any co-residuary devisee, or co-heir, have the like decree. (*r*)

Rule 4.—Any one of several persons for whom a trust is held under any deed or instrument may, without including any other of such persons, have a decree for the execution of the trusts of the deed or instrument. (*s*)

Rule 5.—In all cases of suits for the protection of property pending litigation, and in the nature of waste, one person may sue on behalf of himself, and of all persons having the same interest.

Rule 6.—Any executor or trustee may obtain a decree against any one legatee, next of kin, or person for whom a trust is held, for the administration of the estate, or the execution of trusts.

Rule 7.—In all the above cases the Judge, if he shall see fit, may require any other person to be made a party to the suit, and may give the conduct of the suit to such person as he may deem proper, and may make such order, in any particular case, as he may deem just, for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Rule 8.—In all the above cases the persons who, according to the practice of the Court, would be necessary parties to the suit, shall be served with notice of the decree, (*t*) and after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may by an order of course have liberty to attend (*u*) the proceeding under the decree; and any party so served may within three months from such service apply to a Judge to add to the decree. (*v*)

Rule 9.—In all suits concerning real or personal estate (*w*) vested in trustees (*x*) under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust in the same manner and to the same extent as the executors in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit with the trustees or executors; but the Judge may, upon consideration of the matters on the hearing, if he shall so think fit, order such persons, or any of them, to be made parties. (*y*)

(*r*) A suit may be proceeded with without making the real representatives of residuary devisees who have died abroad before the institution of the suit, parties to the suit, although the devisees themselves have, through ignorance of their death, been so named. Bateman v Cooke, I W. R. 242.

(*s*) So one *cestui que trust* may, without serving his *co-cestui que trust*, have a decree for the appointment of new trustees. Jones v James, 9 Hare, app. lxxx.—It seems too that the rule applies to a Bill to make a trustee responsible for a breach of trust. M'Leod v Annesley, 16 Beav. 600; 22 L. J. Ch. 637; 17 Jur. 608; but see Jesse v Bennett, 6 DeG. M. & G. 355; 26 L. J. Ch. 63. In a case before the Court however, Bridget v Hames, 1 Coll. 72, it was held by V. C. Knight Bruce, that a trustee might file a bill against one of several *cestuis que trusts* to recover the trust securities, without making the other *cestuis que trusts* parties.

(*t*) The rule as to serving parties with notice of the decree applies to infants; Clarke v Clarke, 20 L. T. 88; 1 W. R. 48; and to parties out of the jurisdiction; Chalmers v Laurie, 10 Hare, app. xxviii; 1 W. R. 265.

(*u*) See Lewis v Clowes, 10 Hare, app. lxii, and note, as to liberty to attend.

(*v*) When a party served with notice of a decree feels himself aggrieved thereby, he should move the Court on notice for leave to file a bill in the nature of a Bill of Review. Kidd v Cheyne, 18 Jur. 348. Service of notice of a decree for sale in a suit does not make the decree binding on a judgment creditor, who is not a party

to the cause. Knight v Pocock, 24 Beav. 436; 27 L. J. Ch. 297; 4 Jur. N. S. 197; 30 L. T. 126; see also as to this rule generally, Doody v Higgins, 9 Hare, app. xxxii; 2 Jur. N. S. 1068.

(*w*) The operation of this rule is not confined to administration estates. Fowler v Bayldon, 9 Hare, lxxviii; comp. M'Leod v Annesley, *ante*. In applying it generally, however, the Court will exercise the discretion given by the concluding clause. Thus in Tudor v Morris, 22 L. J. Ch. 1051; 1 W. R. 426, it was held that the trustees of mortgaged property did not sufficiently represent their *cestuis que trusts* in a suit for foreclosure. Comp. Cropper v Meliersh, 24 L. J. Ch. 430, where it was observed by V. C. Stuart, that the Court would only hold the Section to apply to foreclosure suits in extraordinary cases. These observations were commented upon with disapprobation by V. C. Wood, in Wilkins v Reeves, 3 W. R. 305. And in a similar suit, Goldsmid v Stoneheaver, 9 Hare, xxxvii; 22 L. J. Ch. 109; 17 Jur. 199, it was held that infant *cestuis que trusts* were sufficiently represented by their trustees, although the rule was not extended to adult *cestuis que trusts*, except as to the shares of children entitled in remainder, vested in the trustees under a settlement. So also where an equity of redemption was granted by deed to trustees upon trust for certain parties, some of whom were infants, and the mortgagee filed a bill for foreclosure against the trustees of the settlement, and the adult *cestuis que trusts* only as defendants, upon the death of one of the latter after the filing of the bill, the Court made a decree for sale in the absence of the infant *cestuis que trusts* and of the representative of the deceased defendant, upon an affidavit of the trustee of the settlement that it would be for the benefit of the infants, and at the same time ordered the proceeds to be paid into Court. Siffken v Davis, Kay, app. xxi. But the rule does not apply where the trustees have disclaimed; Young v Ward, 10 Hare, app. lvii; nor ordinarily, where the surviving trustees, or the representatives of such as are dead only, are made parties; Stansfield v Hoben, 16 Beav. 189.

In cases where executors of a deceased mortgagor are also parties to a suit for foreclosure, it has been held that the *cestuis que trusts* need not be joined in the suit upon the ground apparently that the whole property out of which the mortgage is to be satisfied is represented. Sale v Kitson, 3 DeG. M. & G. 119; 22 L. J. Ch. 344; 17 Jur. 170; Hanman v Riley, 9 Hare, app. xl; 22 L. J. Ch. 110.

Trustees do not sufficiently represent their *cestuis que trusts* on a bill to set aside a settlement. Reed v Prest, 1 K. & J. 183. In a suit to restore trust property instituted by the representatives of a trustee against his co-trustee, both of whom had committed breaches of trust, in which some of the *cestuis que trusts* had concurred, such *cestuis que trusts* were held necessary parties. Jesse v Bennett, *ante*; Devayne v Robinson, 24 Beav. 86, 99.

(*x*) Executors with a power of sale are within the Section; Shaw v Hardingham, 2 W. R. 657; and when there was a devise to trustees subject to the payment of debts, with a general residuary devise over, the general residuary devisee was held to be an unnecessary party to a suit to carry the trusts of a will into execution. Smith v Andrews, 4 W. R. 358. In a late case, where there was only an implied power of sale in the executrix, Sir J. Romilly, M. R., held that she was not a trustee within the Section. Bolton v Stannard, 27 L. J. Ch. 815; 4 Jur. N. S. 576; 6 W. R. 570.

(*y*) Notwithstanding the above rules, it would seem that when an estate is to be sold under a decree of the Court, all persons interested in the property ought, if possible, to be made parties to the suit, or at least to be served with notice of the decree, under Rule 8. Doody v Higgins, *ante*.

20. The practice of setting down a cause for hearing merely on an objection for want of parties is hereby abolished.

21. If in any proceeding (*z*) it shall appear to a Judge that any deceased person interested in the matters in question has no legal personal representative, he may (*a*) either proceed in the absence of any person representing the estate of such deceased person, or appoint some person (*b*) to represent such estate for all the purposes of the proceeding, on such notice to such person (if any) as the Judge shall think fit, either specially, or generally, by advertisement in the Royal Gazette, and the order (*c*) so made by the said Judge, and any orders

consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such representative had been a party to the proceeding, and had duly submitted his rights and interests to the protection of the Court.

(*z*) A special case under Sir George Turner's Act, 13 & 14 Vic. c. 35, s. 1, is within the Section. Swallow v Binns, 9 Hare, xlvii; 17 Jur. 295. (*Vide* 26 Vic. c. 16, s. 13, *post*, enacting verbatim the said Section); and Petitions, *ex parte* Cramer, 9 Hare, xlvii; 1 W. R. 17.

(*a*) To induce the Court to act under this Section it is necessary first, that the interest of the deceased defendant in the matter in question in the suit should be of little consequence, and secondly that there should be a difficulty in obtaining representation to his estate. Dan. Ch. Pr. 1158, 3rd Ed. Thus it was held that a suit instituted by creditors under a trust deed made for their benefit might proceed against the trustees, without a personal representation of the deceased debtor, the author of the trust, where no representation existed and the estate was insolvent; Chaffers v Headlam, 9 Hare, xlvi; followed in Davies v Boulcot, 1 Drew & Sm. 23; 8 W. R. 205, where the deceased was the grantor of an annuity, who had died insolvent, and whose executors had renounced probate.

Again, where one of two executors is defendant in an administration suit, who was also a residuary legatee, but who had not proved the will or acted in the trust thereof, died insolvent and without a representative after the usual order for taking the accounts had been made, it was held that the suit might proceed, as if his legal representative had been served and had appeared. Rogers v Jones, 1 Sm. & G. 17; 16 Jur. 968; 1 M. R. 14; 20 L. T. 50; Cf. Bessant v Noble, 26 L. J. Ch. 236. As a general rule, the Court will incline to act under the Section when the next of kin expressly refuses to administer; Haw v Vickers, 1 N. R. 242; Tarrett v Lloyd, 2 Jur. N. S. 371; or pays no attention to a notice calling upon him to administer; Whiteaves v Melville, 5 W. R. 676; Davies v Boulcot, *ante*; or dies without doing so, Swallow v Binns, *ante*.

As to cases where a will has been proved abroad, see Hewetson v Todhunter, 22 L. J. Ch. 76; Sutherland v De Virenne, 2 Jur. N. S. 301. And when a defendant, interested in an estate which was being administered by the Court, died abroad, and his executors proved the will abroad, but refused to prove it in England, the M. R. appointed a representative of the deceased defendant, in order that the suit might be revived against him; Bliss v Putnam, 29 Beav. 20; 30 L. J. Ch. 38; 7 Jur. N. S. 12; the Section, too, applies where the claim of the deceased defendant is consequent upon a remote possibility. So a claim for the appointment of new trustees was allowed to proceed in the absence of a personal representative of the deceased, when such deceased had an interest in the trust funds in the event of the death of his child, (the infant plaintiff,) but had died indebted, and without any other property; Magnay v Davidson, 9 Hare lxxxii; and *a fortiori* when the interests of the deceased defendant are identical with those of the plaintiff or with those of other parties represented; Hewetson v Todhunter, *ante*; Cox v Taylor, 22 L. J. Ch. 910; and Lorg v Stone, Kay xii; 23 L. J. Ch. 200. When a subsequent mortgagee, having died after a decree for foreclosure, the Court, there being difficulty in obtaining representatives to his estate, held that the suit might proceed without any person representing it. Comp. Abrey v Newman, 10 Hare, lxviii; 22 L. J. Ch. 627; 17 Jur. 153. In the Dean of Ely v Gayford, 16 Beav. 561; 22 L. J. Ch. 629; 17 Jur. 219, a widow was appointed to represent the estate of her husband, who was a tenant for life of tithes, and had died without a personal representative.

But it has been held that the Section does not apply when the personal representative would have active duties to perform, Fowler v Bayldon, 9 Hare, lxxv; nor, it is said, when he would represent interests adverse to the plaintiff; Headden v Emmett, 22 L. T. 166; nor when the object of the suit is to administer the estate of the intestate; Silver v Stein, 1 Drew. 295; Groves v Levi or Lane, 9 Hare, xlvii; 16 Jur. 1051; nor when the object is to set aside the deed executed by the intestate; James v Astor, 25 L. J. Ch. 343; 2 Jur. N. S. 224; M'Lean v Dawson, 27 Beav. 21; 5 Jur. N. S. 1091; nor, it would seem, as a general rule, when a decree is sought against the very party to be represented, as when a sub-mortgagee sought a decree for a foreclosure without making the personal representatives of the first mortgagee parties; Bruiton v Birch, 22 L. J. Ch. 911; the objection will not apply however, when the heir at law and executors named in the will of a deceased person, whose estate may be charged by the suit, are parties, though the executors have not

proved; Goddard v. Haslam, 1 Jur. N. S. 251; and the late case of Ashmall v Wood, 25 L. J. 53; 1 Jur. N. S. 1130. The Court will not, under this Section, appoint a person to receive a sum of money in Court, payable to a deceased person, though the amount be small; Rawlins v M'Mahon, 1 Drew. 225; and even when a representative has been appointed in the suit, it will not direct the money to be paid to him, but will order it to be carried over to a separate account; Byam v Sutton, 19 Beav. 646.

(*b*) The proper person to be appointed under this Section, is the person who would be appointed administrator *ad litem*, Dean of Ely v Gayford, *ante*; where a defendant died and his will was not proved in consequence of a contest as to one of his testamentary papers, the Court appointed the executor named in his will to represent him; Hele v Ld. Bexley, 15 Beav. 340; Cf. Ashmall v Wood, *ante*; so the executor of a testator who had proved the will in India, but had refused to take out letters of administration in England, was appointed to represent his estate under this Section; Sutherland v De Vienne, *ante*; and in Hewetson v Todhunter, *ante*, the Court appointed the Counsel of an executor, a party to the suit, who had proved his testator's will in America, to represent the testator's estate. But no appointment can be made without the consent of the person sought to be appointed. Hill v Banner, 26 Beav. 372; 7 W. R. 81; The Prince of Wales, &c. Co. v Palmer, 25 Beav. 605.

(*c*) As to the form of an order under this Section, Hele v L'Boxley, *ante;* Whittington v Gooding, 10 Hare. xxix. The application for it is usually made by motion *ex parte*, but before the order is drawn up notice should be given to the persons entitled to administer; Davies v Boulcott, *ante;* but it seems that the order may be made at the hearing; Hewetson v Todhunter, *ante;* this course was pursued in Lloyd v Attwood, L. J. Nov. 3, 1858. In Chaffers v Headlam, it was made on motion on notice to all parties.

22. All writings may be proved at the hearing, as well when the evidence is taken by the examiner as in other cases, on ten days notice thereof to the Solicitor of the opposite party, whether it be necessary to cross-examine the witnesses thereto, or otherwise; and whenever it may be necessary to save the expense of witnesses' attendance to prove the same, they shall be received in evidence on satisfactory proof by affidavit at such hearing, that copies thereof have been served on the Solicitor of the opposite party fourteen days before the day noticed for hearing, and that no notice has been received seven days before that day that such writings will be required to be proved.

23. Whenever the plaintiff shall be required to take any step in the cause, a Judge on application by any defendant, whether required to answer the Bill or not, for a dismission of the cause, after fourteen days notice, may order the same, unless good cause be shewn by affidavit to the contrary; and any mistake by a party in following the course of practice in any proceeding of the said Court may be rectified by order of a Judge on payment of costs, if in his opinion it shall advance the justice of the case.

24. No suit in the said Court shall be dismissed by reason only of the misjoinder (*d*) of persons as plaintiffs (*e*) therein, but whenever it shall appear to a Judge, that notwithstanding the conflict of interest in co-plaintiffs, or the want of interest

in some of them, or the existence of some ground of defence affecting any of them, they or any of them may be entitled to relief, the Judge shall have power to grant such relief, and to modify his decree according to the special circumstances of the case, and for that purpose to direct such amendments as may be necessary; and at the hearing, before such amendments are made, to treat any one or more of the plaintiffs as if he or they were a defendant or defendants in the suit, and the remaining or other plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record; and where there may be a misjoinder of plaintiffs, and the plaintiff having an interest shall have died leaving a plaintiff on the record without an interest, the Judge may at the hearing order the cause to stand revived, and proceed to a decision of the cause, if he shall see fit, and give such directions as to costs or otherwise as may appear just.

(*d*) As to misjoinder, see Mit. on Pl. 5th Ed. 399.

(*e*) This Section applies to a plaintiff suing on behalf of himself and others, where on a bill by one member of a Company on behalf of himself and all others except the defendants, praying an account of the receipts and payments of the defendants on behalf of the Company, and the payment of what should be found due to the plaintiff, it appeared that, owing to circumstances, the interests of some of the persons represented by the plaintiff were different from his, it was held, that the case was within the 49th section of 15 & 16 Vic c. 86 (of which this section is virtually a copy,) and that the plaintiff might treat the absent plaintiffs as defendants, and determine whether a decree should be made. Clement v Bowes, 1 Drew, 684, 694; 22 L. J. Ch. 1022; 1 W. R. 442. In this case the Court directed the plaintiffs having conflicting interests to be served with, and to have liberty to attend the proceedings on taking the accounts directed; *ib.* See too, Beeching v Lloyd, 3 Drew, 227; Evans v Coventry, *id.* 75; on appeal, 5 DeG. M. & G. 911; Stupart v Arrowsmith, 3 Sm. & G. 176; 2 Jur. N. S. 153. The section is imperative, Clement v Bowes, *ante.* But see Barton v Barton, 3 K. & J. 512. See as to plaintiff filling two characters; Carter v Sanders, 23 L. J. Ch. 679; also as to misjoinder since the Act, Williams v Page, 4 Jur. N. S. 102.

Where a bill was filed by a husband and wife to set aside an appointment made by the wife, on the ground that her execution was fraudulently obtained, this is not merely a case of misjoinder which can be cured under this section, and the bill must be amended by making it the bill of the wife by her next friend. Hope v Fox, 1 J. & H. 456; 7 Jur. N. S. 186; V. C. Wigram.

25. Any Judge may adjudicate on questions arising between parties (*f*) interested in the property respecting which the questions may have arisen, or where the property in question is comprised with other property in the same settlement, will, or other instrument, without making the other parties interested under the same settlement, will, or other instrument, parties to the suit, and without requiring the whole trusts and purposes of the settlement, will, or other instrument, to be executed, under the direction of the Judge, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount

of the property touching which the question may have arisen (*g*); but if the application be fraudulent, or for any other reason ought not to be entertained, no such adjudication shall be had.

(*f*) This section was held to apply to a petition under the Trustee Act of 1850, presented by some only of the persons beneficially interested in a trust fund; Re Sharpley's Trusts, 1 W. R. 271; and to a special case, Re Brown, 9 W. R. 430; 7 Jur. N. S. 650

As to special case, *vide* 26 Vic. c. 16, s. 13, *post.*

(*g*) The section only applies when some of the persons interested in the question at issue, *in every point of view*, are before the Court. Swallow v Binns, 9 Hare, app. xlvii; 17 Jur. 295. Thus when the question was between the claims of the surviving children, and the representatives of deceased children under a settlement, the Court refused to proceed in the absence of any party representing the interests of the deceased children; *ib.* A party will not be allowed to proceed with the case under this section by striking the names of some of the defendants (who are out of the jurisdiction) out of the record, and prosecuting without them. Lanham v Pirie, 2 Jur. N. S. 1201; 26 L. J. Ch. 80.

This section does not make the decree of the Court binding on the absent parties as the 42nd section of 15 & 16 Vic. c. 86, (same as sec. 19 *ante*) does when notice of the decree has been served upon them under the 5th Rule. Doody v Higgins, 9 Hare, xxxii; 2 Jur. N. S. 1086.

This section enables the Court to direct the administration of one or more specific trusts created by an instrument without directing the performance of all. Parnell v Hingston, 3 Sm. & G. 337; Prentice v Prentice, 10 Hare, xxiii.

26. Whenever a demurrer (*h*) will lie to a Bill for want of equity, the Judge on the argument may, if the facts warrant, instead of dismissing the Bill, order the remedy as at common Law (*i*); or he may make such other order as to proceeding therein on the Common Law side of the Supreme Court, and for the trial of the same, on such terms as to payment of costs or otherwise, as may appear to him just.

(*h*) A demurrer will lie wherever it is clear that, taking the charges in the bill to be true, the bill would be dismissed at the hearing; but it must be founded on this, that it is an absolute, certain, and clear proposition that it would be so; for if it is a case of circumstances, in which a minute variation between them as stated by the bill, and those established by the evidence, may either incline the Court to modify the relief or to grant no relief at all; the Court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support the demurrer. Dan. Ch. Pr. 437.

The rule that all matters of fact appearing on the bill are admitted for the purposes of the demurrer has been carried so far, that the Court has refused to allow the inaccurate statement of a deed in the bill to be corrected by a reference to the deed itself; Cudden v Tite, 1 Gif. 395; see Campbell v Mackay, 1 M. & Cr. 603, and other cases cited in Daniell's Ch. Pr. 438 & 9. The only exceptions to the rule are, when the averment is repugnant to other statements in the bill, Loker v Rolle, 3 Ves. jun. 7; Flint v Field, 2 Anst. 543; or contrary to any fact of which the Court is bound to take judicial notice; Taylor v Barclay, 2 Sim. 213; but see the King of the Two Sicilies v Wilcox, 1 Sim. N. S. 301. Ambiguous or inconsistent statements in a bill will, on demurrer, be construed adversely to the pleader; Vernon v Vernon, 2 M. & Cr. 145; but the rule does not enable a defendant to displace such statements by any inferences of facts which may not be inconsistent therewith; Simpson v Fogo, 1 J. & H. 18.

As to what averments will prevent a demurrer from lying to the bill, see Plumbe v Plumbe, 4 Y. & Col. Exch. 350; Bowser v M'Lean, 9 W. R. 112, L. C.; Jackson v North Wales Ry. Co., 13 Jur. 69; Wormald v Delisle, 3 Beav. 18; Sibson v Edgeworth, 2 De G. & Sm. 73; Smith v Hay, 30 L. J. Ch. 45, H. L.; Bothemley v Squire, 3 Drew 517; Dent v Turpin, 2 J. & H. 139.

(*i*) There would appear to be some difficulty in carrying out such a provision, in the absence of more particular directions either in the Act or by some rule of Court in reference to it; there seems to be no similar provision in the English Acts.

27. Every affidavit to be used in the said Court shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be confined to a distinct portion of the subject, and shall in every case be filed after being used in the Court. Copies of all affidavits and other writings used on any motion or petition, except in cases of injunction or petitions *ex parte*, shall be served on the opposite party six days before being used, those in answer, three days, and any in reply, which shall be confined to new matter alleged in such answer, one day, beyond which none shall be allowed.

28. No suit (*k*) in the said Court shall be open to the objection that a merely declaratory decree or order is sought thereby (*l*), and it shall be lawful for the Judge to make binding declarations of right, without granting consequential relief. (*m*)

(*k*) A petition under the Trustees' Relief Act is within the 50th sec. of English Act, (of which this is almost a verbatim copy.) Re. Walker, 16 Jur. 1154; but see Sharshaw v Gibbs, 18 Jur. 330; Kay, 333.

(*l*) This could not be done under the old law. Grove v Bastard, 2 Phil. 622.

(*m*) When a declaration is asked, and also an injunction, such injunction is consequential relief; Marsh v Keith, 1 Drew. & Sm. 342; 9 W. R. 115.

The tendency of the later decisions on this Section has been considerably to restrict its operation. Thus, notwithstanding the earlier cases of Fletcher v Rogers, 10 Hare, xiii; 1 W. R. 125; and Wright v King, 2 W. R. 405; it was held by Lord Justice Turner, (Lord Justice Knight Bruce abstaining from giving an opinion,) that it gave the Court no power to declare future rights; Lady Langdale v Briggs, 26 L. J. Ch. 27, 45; 2 Jur. N. S. 982; *vide* the case in the Court below, 3 Sm. & G. 245; 25 L. J. Ch. 100; comp. Burt v Short, 1 W. R. 145; Greenwood v Sutherland, 10 Hare, xii; and Garlick v Lawson, *ib.* 17; where the Court in a special case refused to make a binding declaration under this Section, as to the interests of parties entitled in reversion. See also Gosling v Gosling, 1 Jo. 265; Fyfe v Arbuthnot, 1 DeG. & J. 406; Tell v Cade, 10 W. R. 38. It seems that Fletcher v Rogers cannot now be relied on as an authority.

Nor will the Section entitle a party to a prospective declaration, guarding against a claim which may never be made. Jackson v Townley, 1 Drew, 617; 22 L. J. Ch. 949; 17 Jur. 643.

29. No suit shall abate where the cause of action shall survive by the death of one or more of the plaintiffs, or defendants; but, upon suggestion of such death, to be entered by the Solicitor on the Bill filed, the suit shall be allowed to proceed without further change, in favour of or against the surviving party, as the case may be; and on the death of one or more plaintiffs or defendants in any suit, where the cause of action shall not survive, it shall only abate as to the person so dying.

30. Whenever it may be necessary to revive a suit by or against the representatives of a deceased party, or on transmission of interest or liability (*n*), no Bill of revivor, or sup-

plemental Bill shall be used, but the Judge may, on motion or petition, order (*o*) that the same stand revived on such terms as may be just.

(*n*) This and the previous Section form a partial re-enactment of sec. 52, of 15 & 16 Vic. c. 86; as to the entire provisions of that section, and the decisions thereunder; see Morgan, 209.

The Section applies to suits commenced before the Act came into operation: Lowes v Lowes, 16 Jur. 968; 1 W. R. 14; Cf. Jones v Woods, 20 L. T. 50; and even to cases where the abatement took place before that period, *ib.* A special case is within the Section; Wilson v Whately, 1 Jo. & H. 331; comp. Ainsworth v Alman, 14 Beav. 597.

The English Act distinguishes between "a change of interest" and "a transmission of interest;" *Quc.*—Whether the words of the above Section would include both?

A devise by a defendant seems to be a "transmission of interest" within the Section. Lowe v Watson, 1 Sm. & G. 123. In the later case of Dendy v Dendy, 5 W. R. 221; 28 L. T. 262; cited and approved by V. C. K. in Williams v Williams, 9 W. R. 266, Lowe v Watson was cited as an authority for enabling the devisee of a sole plaintiff to revive under this Section. V. C. W. however, declined to make the order in that case, distinguishing it from Lowe v Watson, where the transmission of interest was by a defendant. But in Gilchrist v Tomlinson, 8 W. R. 466; 6 Jur. N. S. 532; 2 L. T. N. S. 350, V. C. S. made an order of revivor under this Section on the death of a sole plaintiff, and on the motion of his devisee. In Jackson v Ward, 1 Gif. 30; 7 W. R. 426, the same Judge, following Morrett v Walton, 2 W. R. 544, made an order for revivor on the death of a sole plaintiff after decree; and in Flockton v Slee, 5 Jur. N. S. 422, 1090; 7 W. R. 393, the M. R. made the same order on the application of the personal representative of a sole plaintiff who died *before decree*. See, however, Dobson v Faithwaite, 10 W. R. 29. In Hall v Cline, 20 Beav. 577, the M. R. permitted a plaintiff whose co-plaintiff, a mortgagee, had died before decree, to carry on the proceedings against the devisees and executors of the latter. See generally as to carrying on proceedings in a creditor's suit, Brown v Lake, 2 Coll. 620; Elliott v Ince, 27 L. J. Ch. 51.

When a plaintiff in a foreclosure suit had, after decree, assigned over all his interest in the suit, an order to revive was made under this Section, but the assignee was ordered to pay the costs of reviving. James v Harding, 24 L. J. Ch. 749; 3 W. R. 474. It seems, however, the Section does not apply where a co-plaintiff is placed in such a position that he ought to be a defendant. Jervoise v Clarke, 2 W. R. 337. So again, when one of two creditors, plaintiffs in a creditor's administration suit, upon an abatement by the death of an executor of the testator, obtained letters of administration *de bonis non* to the testator's estate, it was held that a suit could not be revived against him under this Section. Tate or Yate, v Leithead or Lighthead, 9 Hare, app. li; 16 Jur. 964; 22 L. J. Ch. 9; 1 W. R. 4; 20 L. T. 59; but see Creswell v Bateman, 6 W. R. 220. Where, however, there is a sole plaintiff and a sole defendant, and the defendant dies, having appointed the plaintiff his executor, the latter may obtain an order to revive the suit against the persons beneficially interested, who have been summoned to attend the proceedings in Chambers. Pedder v Pedder, 8 W. R. 16; 5 Jur. N. S. 1145; 29 L. J. Ch. 64; but see Dobson v Faithwaite, 10 W. R. 29. But the Section does not apply when the interest of the parties has *wholly determined*. Watts v Watts, Johns 631. It seems that where the relief sought is larger than what would have formerly been given under the usual supplemental decree, (as to which see Mitf. on Pl. p. 85, *et seqq.*) a supplemental bill is still requisite. But the mere fact that under the old practice an original bill in the nature of a supplemental bill would have been necessary, does not exclude the operation of the Section. Creswell v Bateman, 6 W. R. 220; see however, Williams v Williams, *ante*, where a contrary doctrine was laid down. The mere existence, too, of special questions, *ex. gr.* whether it will be for the benefit of an infant to continue an abated suit, though it may be a reason for not making the order as of course, does not, it would seem, render a bill indispensable. Phippen v Brown, 1 Jur. N. S. 698; Notley v Palmer, 3 W. R. 201; Barrett v White, 3 W. R. 526; Goodall v Skerratt, 1 Sm. & G. app. vii.

In Dean and Chapter of Ely v Edwards, 22 L. J. Ch. 629, it was said "the Court would not, in making an order under this Section to revive a suit against the executors of a deceased defendant, order them to admit assets, or in default, direct an account of their testator's estate to be taken." This case has since been overruled by Edwards v Batley, 19 Beav. 457; 23 L. J. Ch. 872, where it was said that in such a case no bill of revivor or supplement is necessary. And an order similar to that refused in Dean and Ely v Edwards, was made in Cartwright v Shepheard, 20 Beav. 122. And where the common order might have been obtained under this Section no decree will in future be made on a bill of supplement and revivor. Edwards v Batley, *ante*. These, however, were administration suits, and it seems the same rule will not apply to suits for specific performance. Collard v Roe, 1 Gif. 311; 8 W. R. 39; 35 L. T. 87; 5 Jur. N. S. 1242, V. C. S. Whenever a defendant dies before appearance the suit cannot be revived against his representatives. Bland v Davidson, 21 Beav. 312; Williams v Jackson, 7 W. R. 104; 5 Jur. N. S. 264; see old practice, Crowfoot v Mander, 9 Sim. 396.

When a defendant dies after hearing, and before decree, an order of course for revivor against his representative may be obtained. Petre v Petre, 1 W. R. 362; 21 L. T. 136. When the cause becomes abated between the hearing and delivery of judgment, the decree may nevertheless be drawn up. Collinson v Lister, 20 Beav. 355; Belsham v Percival, 8 Hare, 157.

An order to revive was made against the representatives of a defendant who demurred, and died ten years after the demurrer had been allowed, the plaintiff having liberty to amend. Deeks v Stanhope, 24 L. J. Ch. 580; 1 Jur. N. S. 413. It was stated that there can be no revivor after lapse of twenty years, Bland v Davison, *ante;* but see *contra*, Alsop v Bell, 24 Beav. 451. As a general rule there can be no revivor for costs. Morgan v Scudamore, 2 Ves. jun. 313; Andrews v Lockwood, 15 Sim. 153; 2 Ph. 399.

(*o*) The common order to revive is obtained as of course; Boufil v Purchas, 16 Jur. 965; 1 W. R. 12; but where there are special circumstances arising out of the case, a special application to the Court is necessary. Martin v Hadlow, 9 Hare, lii; Phippen v Brown, 1 Jur. N. S. 698; Goodall v Skerratt, 1 Sm. & G. app. vii. If obtained *ex parte* it is of course liable to be objected to by any parties to the suit; Jackson v Ward, 1 Gif. 30; 7 W. R. 426; and if obtained on a false statement of facts, will be discharged as irregular; Brignall v Whitehead, 5 L. T. N. S. 301; 10 W. R. 69.

In reference to service of the order to revive, and appearance thereto, under the English Act, but as to which the above Sections are silent, see Morgan, 214.

Executors against whom an order had been obtained under this Section, were held entitled to answer; Martin v Purnell, 3 W. R. 395; and it seems interrogatories may be filed on such an order. Anon. 25 L. T. 61. A suit revived under this Statute is to be considered a new suit so far as to entitle the defendant to move that the plaintiff (if resident out of the jurisdiction) do give security for costs. Jackson v Davenport, 9 W. R. 356.

31. (*p*) Any person claiming to be a creditor, or the next of kin, or interested in the will of a deceased person, (*q*) may obtain as of course a Summons (*r*) (F) from any Judge, requiring the executor of such deceased person to shew cause why an order should not be granted for the administration of the personal estate, or the real estate, when the whole thereof is by devise vested in trustees for sale and for receipt of the rents and produce thereof; and upon affidavit of the due service of such summons, or on appearance of such executor, and affidavit of such other matters (if any) as such Judge shall require, he may make the usual order for the administration of the estate, with such variations as may be necessary, (*s*) which order on being filed with the Clerk,

along with the summons and affidavits, shall have the force of a decree to the like effect made on the hearing of a cause between the parties; and the same may be granted to such one or more of the claimants, or classes of claimants, in case of application by different persons or classes, and upon such terms as the Judge shall think fit.

(*p*) This Section applies only to simple cases. When, therefore, the defendant in an administration summons sets up a release, the validity of which was disputed, the Court dismissed the summons as irregular. Acosta v Anderson, 19 Beav. 161; 24 L. J. Ch. 437; see also Rump v Greenhill, 20 Beav. 512; 24 L. J. Ch. 90; 1 Jur. N. S. 123, where it was held that a decretal order on an administration summons was no answer to a suit embracing matters which could not be included in that decree. But where a decree and accounts have already been taken at Chambers, the Court will decide upon the rights of the parties, unless questions of great difficulty are involved. West v Laing, 3 Drew. 331; 4 W. R. 1.

(*q*) Whether the assignee or mortgagee of a residuary legatee can obtain the summons, seems to be doubtful. Whittington v Edwards, 3 DeG. & J. 243; 7 W. R. 72. The Court has power under this Section to make an order for the administration of the effects bequeathed by the will of a married woman in pursuance of a power. Sewell v Ashley, 3 DeG. M. & G. 933; 17 Jur. 269; 22 L. J. Ch. 659.

(*r*) The Section of the English Act, 15 & 16 Vic. c. 86, s. 45, from which this provision is taken, *expressly* provides what may be done at *Chambers*, and the consolidated orders made in reference thereto, point out the mode of doing it; it may be, however, that for the purposes of this summons, the form of the order appended to the Act would be held equivalent to an express enactment in this instance.

(*s*) In general only the usual administration order will be made on an administration summons; Partington v Reynolds, 4 Drew. 253; 27 L. J. Ch. 505; 4 Jur. N. S. 200; 6 W. R. 615; 31 L. T. 7; Blakeley v Blakeley, 1 Jur. N. S. 368; Re Fryer, 26 L. J. Ch. 398; 3 K. & J. 317; Cf. Jones v Morrell, 2 Sim. N. S. 241. But the Court has power, on reasonable grounds, to direct further accounts or enquiries on such a summons; Mutter v Hudson, 2 Jur. N. S. 34; Delevante v Childe, 6 Jur. N. S. 118; and in a late case, Brooker v Brooker, Re Brooker's estate, 3 Sm. & G. 475; 26 L. J. Ch. 411; 3 Jur. N. S. 381; 28 L. T. 354; V. C. Stuart made an order for an injunction and receiver as against the administratrix of a deceased intestate. After the common decretal order had been made in Chambers, a case of wilful default against the administratrix having come out in the course of the proceedings under the order in Chambers, (see to as to wilful default, Tickner v Smith, 3 Sm. & G.) But this case has not been generally followed, for in Partington v Reynolds, *ante*, V. C. Kindersley held that the Court had no power to charge the defendant as for a wilful default, as by so doing it would be directing accounts on a footing inconsistent with the decree itself. See Delevante v Childe, *ante*; Hodson v Ball, 1 Phil. 177; Nelson v Booth, 3 De G. & J. 119; 27 L. J. Ch. 782; 6 W. R. 845; 5 Jur. N. S. 23.

In Re Wiltshire estate, 8 W. R. 133; 6 Jur. N. S. 189; it was held by V. C. Stuart that an executor cannot be charged upon an admission of assets, on an administration summons.

A plaintiff in an administration suit commenced by summons, may move to stay proceedings in a suit commenced by bill, if it can be shewn that the order will effect all that can be directed by a decree made upon a bill filed, Ritchie v Humberstone, 22 L. J. Ch. 1006; but see Rump v Greenhill, *ante*, Cf. Penny v Francis, 30 L. J. Ch. 185; Furze v Hennett, 2 De G. & J. 125; Gwyon v Peterson, 26 Beav. 83. After an order made on summons, the Court will stay an execution at law against the executor as after a decree obtained on a bill; Gardner v Garrett, 20 Beav. 469.

Upon an administration summons, parties out of the jurisdiction must be served with notice of the decretal order; Strong v Moore, 22 L. J. Ch. 917; 1 W. R. 509. A devisee of real estate, subject to the payment of a testator's debts and funeral and testamentary expenses, is a trustee within the Section;

Ogden v Lowry, 25 L. J. Ch. 198; 4 W. R. 156; see also Pigott v Young, 7 W. R. 235; V. C. K.

When a decree has been made in an administration suit, and the personal estate is insufficient for payment of debts, the Court may direct sale of real estate for that purpose, and direct costs to be paid out of the proceeds. 26 Vic. c. 16, s. 10, *post*.

32. On making any decree the Clerk shall draw up and submit minutes of the same to the Solicitors on both sides, who may attend the Clerk upon an appointment to be made by him, to settle the same. If any dispute shall arise as to the matter of such decree, the Judge who heard the cause shall, on application of either party, finally determine such dispute. Instead of enrolment of such decree the Clerk shall keep a Book, in which he shall enter an abstract of the pleadings, and a reference to the evidence, (*t*) together with the decree in full. But this entry shall not be made until after decision in any case of appeal, and such appeal, as well as an appeal from any order, shall be made within twenty days after the decision of the cause, unless a Term intervene, and then at such Term. No re-hearing, Bill of review, or supplemental Bill in the nature of such Bill, shall be permitted; but newly discovered facts, or matters allowed on such Bill of review, if stated in the notice of appeal, may be heard and determined on the appeal as in cases of new trial. A certified copy of the entry, or of any part thereof, or a memorial thereof, shall be evidence of such decree, or of the part thereof required, either in Court, or for registry in any County Registry of Deeds and Wills.

(*t*) It would seem almost impossible for the Clerk, whose office is in Fredericton, where the Terms and Monthly Sittings of the Court are held, to make a reference to evidence (*whatever this may mean*) taken *viva voce*, or in any other way, before a Judge in other parts of the Province; and even in the case of *viva voce* evidence in open Court at Fredericton there is a difficulty, inasmuch as there is no provision made by the Act for taking such evidence, and the only record of it, if not voluntarily taken down by the Clerk, would be the notes of the Judge himself. Besides, if a Judge can be called upon to hold a Court or transact Equity business at *Chambers*, in any other place than Fredericton where the records of the Court are kept, very grave questions arise as to *how* any papers in a cause on file can be produced before the Judge; *who* is to be responsible for the safe keeping and transmission from and to the office again; and as to papers filed with the Judge at such sitting of the Court or Chambers, or evidence taken before him, *who* is to be responsible for their safe keeping and proper filing in the office at Fredericton; and *how* the decree or order of the Judge made in such a case can be noted by the Clerk, and such evidence referred to in making an entry thereof (even if such entry could be made at all) in the Book of Decrees. *Que.*—Who is to prepare the *abstract of the pleadings*, the Clerk or the Solicitors?

With all these difficulties, self-apparent as they must have been to the Legislature, could they have intended that "*the Supreme Court in Equity*" might be opened in *five distinct* places in the Province by the five Judges separately, and at the same instant of time; or that it *might and should* be opened at the *usual place* of sitting of the Court of Chancery, by *any one* of

the five Judges, in place of, and invested with the powers of the Master of the Rolls before the passing of this Act? There being no provision (except the implied one in Sec. 31, *ante*, p. —, and the form therein referred to) in the Act, and no Rule of Court made, in regard to doing the business of the Court at *Chambers*, it may be fairly inferred that all such business should be transacted in the same manner as formerly in the Court of Chancery.

33. Every appeal from any decree or order shall be by notice as in cases of new trial, to be served on the opposite party as well as on the Judge who made the same, and shall be heard at the next Term in the same manner, except that no previous rule shall be necessary.

34. In every case of appeal the pleadings, evidence, and all papers used in any stage of the cause, together with the notes of the Judge who heard the same, or tried any issue therein, shall be produced to the Court on the hearing of the appeal; from the decision of which no writ of error or appeal shall lie, except to the Queen in Council.

35. Any appeal from a decision of any Judge of Probates shall be to the said Court, and such appeal, together with any now pending, shall be conducted in the same manner, and on the like principles, as if the case had originated in Equity, subject only to the directions of the Act of Assembly relating to appeals from Probate Courts.

36. All sales of real estate ordered by the Judge, (*u*) shall be conducted by any officer to whom the same may be referred by the Judge, in the same manner as in sales on Bills of foreclosure of mortgages.

(*u*) Upon such an order being made for sale every person seized or possessed of the land, or entitled to contingent right therein, being a party to the suit or proceeding, shall be deemed to be a trustee, and the Court may make an order to vest the estate in the purchaser, &c., as effectually as if the parties had executed a conveyance of the same. 26 Vic. c. 16, s. 11, *post*.

37. All moneys subject to the control of the Court, shall be paid into the hands of such person or body corporate, or be vested in such securities, as any Judge shall from time to time direct; and all increase thereof shall be added to the principal, and distributed therewith to the person entitled to the same.

38. A decree directing the payment of money shall, from the time when a memorial thereof shall be registered in any County where there may be lands of a party, bind such lands in the same manner as registered common law judgments.

39. The Court shall have power to enforce performance of its decrees and orders by Execution (*v*) (G) against the body, or the goods and chattels, lands and tenements (H) of the

party made liable to such decree or order, and with the like effect as executions issued on the Common Law side of the Supreme Court; and no subpœna for costs shall hereafter be allowed.

(*v*) In England the writ of execution to enforce decrees is abolished, and decrees and orders are enforced by attachment, and when brought up for continued disobedience, the Court will not discharge him until performance of the decree or order and the payment of costs. Consd. orders, Morgan, 495, 501. But *fieri facias, elegit, and venditioni exponas*, are issued in certain cases under the following rule of order xxix, viz:—"*Every person* to whom in any cause or matter pending in this Court, any sum of money or any costs shall have been directed to be paid, shall, after the lapse of one month from the time when the decree or order for payment was duly passed and entered, be entitled to sue out one or more writ or writs of *fieri facias*, or writ or writs of *elegit*, of the Forms set forth in Schedules F and G, or as near thereto as the circumstances of the case may require;" under this rule the following decisions have been had, viz:—

The object of the Rule is to put the party in the same position as a plaintiff at law. Spencer v Allen, 2 Ph. 215. When therefore a writ of *fieri facias* issued into one County has failed to satisfy the demand, another writ may issue into another County, *ib.*; see Hodgson v Hodgson, 23 Beav. 604. This Rule is not interfered with by the Rule as to attachment.

When the order was to pay money on the day *before* the day on which the order was passed and entered, it was held by the Lords Justices that compliance with it was an impossibility, and that a writ of *fi. fa.* issued under it was irregular. Adkins v Bliss, 2 De G. & J. 286; 6 W. R. 453; 26 L. J. Ch. 486.

If the order directs payment within a certain time for service, and it is never served, the writ cannot issue upon it, as in that case there is no default, *ib.* But when the time is not stated in the order, the order is not made ineffectual, but the Court will, on motion, fix a time. Needham v Needham, 1 Hare, 603; on appeal, 1 Ph. 640.

When part of the money directed to be paid had been levied under a *fi. fa.* issued under this rule, and the amount of the levy appeared on the return to the writ, the Court refused the four day order for payment, but made the following order:—"Let the Chief Clerk ascertain and certify the amount now due from the defendant to the plaintiff, and let the defendant within ten days after the date of the Chief Clerk's certificate, pay to the plaintiff what shall be so certified to be due. The order to be taken on affidavit of service." Hipkins v Hipkins, 26 L. J. Ch. 512.

It will be observed that by the English Rule, the *party himself* may issue execution at a certain time fixed, but by the above Section the *Court* are empowered to enforce performance by execution, but it does not authorize an execution to be issued by the party; and it would seem necessary either that the decree or order should contain directions for the execution to issue, or that a separate application should be made to the Court for its issue. This question involves the rights of third parties, and the Sheriff might be placed in a difficult position, both as to life and limb, should an execution be issued without due authority.

On the 23rd March 1839, (see *ante* p. 34,) the only mode of enforcing decrees in England was by process of contempt. 1 Dan. Ch. Pr. 698. But see Rules of Court *ante* 16, as to mode of compelling performance of decrees or orders of the Court here. By these Rules process of contempt to enforce decrees was made unnecessary, and a shorter method provided for; nor would these Rules seem to be abolished by this Section, as it is almost a verbatim copy of Sec. 12, 2 Vic. c. 35, (repealed Stat. *post*), by virtue of which Act they were made.

40. On any decree against any person out of the limits of the Province, a Judge may order process to compel the performance of such decree, either by an immediate sequestration of the real and personal estate of the party proceeded

against, or such part thereof as may be sufficient to satisfy the demand of the plaintiff in the suit; or by causing possession of the estate or effects demanded by the Bill to be delivered to him, or otherwise, as the nature of the case shall require; and may likewise order the plaintiff to be paid his demand of the estate so sequestered, according to the decree; but the plaintiff shall first give sufficient security in a sum to be mentioned by the Judge, to abide such order touching the restitution of such estate, and payment of costs, as may be made in case of the defendant's appearance in such suit. If the plaintiff shall refuse or neglect to give such security, the Judge shall order the estate to remain under the direction of the Court, by appointing a receiver thereof, or otherwise, until the appearance of the defendant, or such order shall be made therein as shall be just.

41. If any decree shall be made as herein last aforesaid, and the person against whom the decree may be, shall within two years after the making thereof come into the Province, within the knowledge of the plaintiff, he shall be served with a copy of the decree within a reasonable time thereafter.

42. If any defendant against whom such decree shall be made shall within two years after the making thereof happen to die without being served with a copy of the decree, his heir, if such defendant shall have any real estate sequestered, or whereof possession shall have been delivered to the plaintiff, or if such heir shall have been a married woman, infant, or not in his right mind, the husband, guardian, or committee of such heir, or if the personal estate of such defendant be sequestered, or possessein thereof delivered to the plaintiff, his personal representative shall be served with a copy of the decree within a reasonable time after it shall be known to the plaintiff that the defendant is dead, and who is his heir or representative, and where he may be served therewith.

43. If any person served with a copy of such decree shall not within three months after such service appear and petition to have the said cause re-heard, the decree shall stand absolutely confirmed against the party served, his heirs and executors, and all persons claiming or to claim by, from, or under him.

44. If any person served with a copy of such decree shall within three months after such service, or if any person not

being served shall within two years next after the making of such decree, appear in Court and petition to be heard with respect to the matter of such decree, and pay down or give security for payment of such costs as may be deemed reasonable, the person so petitioning, his representative, or any person claiming under him, may be admitted to answer the Bill exhibited, and issue may be joined, and such other proceedings, decree, and execution may be had therein as might have been if the same party had originally appeared; but if no such petition shall be made, all such parties shall stand absolutely barred by such decree.

45. The practice of making deposits to answer costs on certain proceedings in the Court is hereby abolished, and the costs shall be allowed and taxed as in other cases.

46. The Forms in the Schedule to this Chapter, or to the like effect, with the explanations, shall be deemed the same as if incorporated in the Sections to which they refer.

SCHEDULE OF FORMS.

(A)

Summons.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c.

To

We command you, that within forty days after the service of this Summons on you, exclusive of the day of such service, you do cause an appearance to be entered for you in our Supreme Court at Fredericton, on the Equity side, in a suit wherein a Bill will be filed against you by [*and another or others*] for [*the foreclosure and sale of certain mortgage land and premises, or the specific performance of a certain contract, or in the same brief manner for whatever may be the cause of suit,*] and observe what our said Court shall direct in this behalf, upon pain of such Bill being taken against you *pro confesso.* Witness , Chief Justice, at Fredericton, the day of, &c. [*day of issuing.*]

D. L. R., *Clerk.*

[NOTE.—See 26 Vic. c. 16, s. 5, *post.* In foreclosure suits the names of the parties, the date of mortgage, and the amount claimed, must be endorsed on the Summons.]

(B)

Supreme Court, Equity Side. } { A. B., *Plaintiff*, and C. D., *Defendant*.

E. F., *Counsel for Plaintiff*.

1. The plaintiff complains that by virtue of an indenture duly registered, [*or as the document may be*,] dated the day of A. D. 18 , and made between [*stating the parties*] he is a mortgagee [*or assignee of a mortgagee, describing the date and consideration of the assignment, or as the case may be*,] of certain property therein comprised, situate and described as follows:—[*describe the property particularly*] for securing the sum of £ and interest, which said mortgage, and a bond given therewith, are now in his custody, (*or as the case may be.*)

2. That the time of payment thereof has elapsed, and that the defendant is entitled to the equity of redemption of the said mortgaged premises.

3. The plaintiff therefore prays to be paid the said sum of £ [*whatever may be due*] and interest, with the costs of this suit, and in default thereof, that the equity of redemption may be foreclosed, the mortgaged premises sold, and the produce thereof applied in payment of his said debt and costs, and for that purpose to have all proper directions given and accounts taken.

A. B. [*the Plaintiff.*]

The above named , the plaintiff, was on the day of , A. D. 18 sworn to the truth of this Bill before me.

G. H. *Commissioner, &c. in Equity.*

(C)

Order of Injunction.

Supreme Court, Equity Side. } Between { A. B. *Plaintiff*, and C. D. *Defendant*.

Before His Honor Mr. Justice the day of , A. D. 18

To Mr. C. D. the above named defendant, his workmen, labourers, servants, and agents,

You and each of you are hereby strictly enjoined and commanded under the penalty of £1000 to be levied on your lands, goods, and chattels, and also of imprisonment, to desist hence-

forth altogether and absolutely from felling or cutting down any timber, or other trees standing, growing, or being in or upon the premises situate and described as follows:—[*describing them as in the Bill, or according to the circumstances*] and from committing or doing any other or further waste or spoil in or upon the said premises, or any part thereof, until order shall be made to the contrary.

By order of the Court, (*or in case of emergency, Given under my hand the day of , A. D.* 18 .)

D. L. R., *Clerk.* ———, *Judge, &c.*

(D)

Interrogatories for answer.

In the Supreme Court, Equity Side. } Between { A. B. *Plaintiff*, and C. D. *Defendant.*

Interrogatories for the examination of the above named defendant in answer to the plaintiff's Bill of complaint.

1. Has not a mortgage been made, given, and duly registered to , of the date, for the sum, and on the premises in the said Bill mentioned, and has not assignment thereof been made to the plaintiff of the date and for the consideraton therein mentioned, or some other and what dates, sums and premises respectively?

2. Has not the time of payment thereof elapsed, and is not the defendant entitled to the equity of redemption of the said mortgaged premises?

&c. &c. &c.

[*Name of Counsel.*]

(E)

Answer.

In the Supreme Court, Equity Side. } Between { A. B. *Plaintiff*, and C. D. *Defendant.*

E. F. *Counsel for Defendant.*

The answer of C. D. the above named defendant, to the Bill of complaint of the above named plaintiff.

In answer to the said Bill, I, C. D. say as follows:—

1. I admit that the mortgage in the Bill and interrogatories mentioned has been made, given, and duly registered as therein stated (*or as the case may be*), and the assignment has also been made as in the said Bill mentioned.

2. I admit the time of payment has elapsed, and that I am entitled to the equity of redemption in the mortgaged premises.

Sworn, &c. [*Defendant's name.*]

(F)

Summons.

In the Supreme Court, Equity Side.

In the matter of the Estate of late of the Parish of , in the County of , deceased.

A. B. against C. D.

Upon the application of , who claims to be a creditor on the estate of the above named , Let the executor of the said attend at my office in (*or* at my dwelling house,) on the day of , at of the clock in the , and shew cause, if he can, why an Order for the administration of the personal estate of the said should not be granted.—Dated, &c.

Judge in Equity.

NOTE.—If the above named do not attend either in person, or by his Solicitor, at the time and place above mentioned, such Order will be made in his absence as the Judge may think just.

This Summons was taken out by J. K. the Solicitor for the above named .

(G)

Execution against the body, &c. to enforce Order or Decree.

Victoria, &c.

To the Sheriff of .

Whereas by a certain Order (*or* Decree) lately made in our Supreme Court in Equity in a certain cause there depending, wherein A. B. is plaintiff and C. D. defendant, it was ordered (*or* decreed) that the said defendant should pay to the said plaintiff the sum of (*or should convey to the said plaintiff, &c. a certain piece of land described as follows: or a certain ship or vessel called the , or deliver certain property as the case may be, describing it as in the Decree,*) as by the said Order (*or*

Decree) remaining as of record in our said Court will more fully appear.* Therefore we command you that you take the said defendant, and him safely keep in your custody until the said sum of be paid to you for the said plaintiff, (*or until the said land, or vessel, &c. be conveyed according to such Decree,*) and if the said defendant shall not within one month from such arrest, make the conveyance aforesaid, you are hereby commanded to take and give possession of [*such land, vessel, or property,*] to the said plaintiff; and make return hereof when fully executed.—Witness J. C., Chief Justice, at Fredericton, the day of A. D. 18 , [*day of issuing.*]

D. L. R., *Clerk.*

(H)

Execution against Goods and Chattels.

Victoria, &c.

To the Sheriff of

Whereas, &c. [*as in the last preceding form to the asterisk.**] Therefore we command you, that of the goods and chattels, lands and tenements, of the said defendant, you cause to be made the sum of for the said plaintiff, and make return hereof when fully executed.—Witness &c. [*as before in last form.*]

D. L. R., *Clerk.*

(I)

Affidavit as to production of Documents.

See *ante* p. 46, *note* (*q*), settled by the Equity Judges in England.

In Chancery.

(*Title.*)

I, of make oath and say as follows:—

1. I say I have in my possession or power, the documents relating to the matters in question in this suit set forth in the first and second parts of the first Schedule hereto annexed.

2. I further say, that I object to produce the said documents set forth in the second part of the said first Schedule hereto.

3. I further say,

[*State upon what grounds the objection is made, and verify the facts so far as may be.*]

4. I further say, that I have had, but have not now, in my possession or power, the documents relating to the matters in question in this suit, set forth in the second Schedule hereto annexed.

5. I further say, that the last mentioned documents were last in my possession on [*state when.*]

6. I further say,

[*State what has become of the last mentioned documents, and in whose possession they now are.*]

7. I further say, according to the best of my knowledge, remembrance, information, and belief, that I have not now, and never have had in my own possession, custody, or power, or in the possession, custody or power of my Solicitors or Agents, or Solicitor or Agent, or in the possession, custody or power of any other person or persons on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document whatsoever relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second Schedules hereto.

NOTE.—If the party denies having any, he is to make an affidavit in form of the 7th, omitting the exception.

CHAPTER 3.

Of Proceedings on a Reference.

Section,

1. Reference, when made.
2. What Summons or Warrant required.
3. When and how to proceed on Reference.
4. Examinations, how to be taken thereon.
5. Accounting parties, how to proceed thereon.
6. Accounts thereon, mode of proof.
7. Objections, how to proceed thereon.
8. Exceptions to report, how to proceed thereon.
9. Subpœnas, how issued.

1. A Reference may be made by a Judge, on the application of either party, to any Barrister, or to any scientific person or accountant, not interested, for any enquiry or other purpose; and the person so specially appointed, on being sworn, shall thereupon become for that purpose an officer of the Court. (*a*)

2. No summons or warrant shall be issued by any officer on a reference other than to require the parties to proceed, which they shall do forthwith, if required by the officer, with power

of adjournment, and, on omission to adjourn, with power to proceed on notifying the parties.

(*a*) The person appointed under this Section would seem to stand in the place of the Master in Chancery, which office is abolished, *ante*, p. 36; and all proceedings before him, except where otherwise directed by this Act, must necessarily be regulated by the practice or proceedings in the Master's office, for which see Grant, Ch. Pr. 311; Smith, Ch. Pr. 96; 2 Dan. Ch. Pr. 789, *et seqq.*

3. If the party obtaining a decree or decretal order directing a reference, shall not within one month from the time of settling the same, proceed therewith before the officer named therein, or if any unnecessary delay take place on any reference, either party, or the officer, may be ordered by a Judge, on good cause shewn, peremptorily to proceed with the same, on such pain of dismissal of the cause, or excluding further proof, or payment of costs, or ordering the return of the officer's proceedings and a new reference, as he may deem right.

4. No interrogatories shall be filed on a reference, commission of partition, or the like, but the examinations shall always be *viva voce* by question and answer.

5. Accounting parties shall in all cases be required to file with the officer, on oath, a debtor and creditor account, unless the plaintiff rely on the schedules to the answer. In either case he may supply by additional account and proof any omissions of the defendant, and the officer shall proceed thereon without requiring a charge from the plaintiff or a discharge from the defendant, unless no discharge should accompany the schedules. Any omissions may also be supplied by the defendant. Each party may be examined on oath for or against his own or the opposite party's account. The books or writings (*b*) of either party, or of any person or party represented by him, or under whom he claims, may also be used in evidence for or against the party producing them, the officer reporting as to the nature of the evidence, when objected to, and the credit due to it.

(*b*) These books and writings, when used in evidence on any reference, are made evidence before the Court or a Judge thereof. 26 Vic. c. 16, s. 23, *post*. This provision, however, is not to extend to suits or proceedings commenced or pending at the time of passing the said Act. 27 V. c. 5, *post*.

6. No person shall be required to prove his account, or any part thereof, until the opposite party shall specify the objectionable items, and deny on oath their correctness, and where there are accounts of deceased persons, or of those under whom any party claims, the denial of the representing party

shall be to the best of his knowledge and belief, except where he may have personal knowledge of the transactions. If the party refuse so to specify and deny, the officer shall pass the accounts on the oath or examination of the party producing them.

7. All objections on a reference shall be made and argued at the time of presenting the proof, unless postponed for further consideration, and when decided, shall be briefly noted in the officer's report, and no exceptions grounded thereon shall afterwards be filed with him or argued.

8. Exceptions to the report shall be delivered to the opposite party within fourteen days after notice of the signing thereof, and if the parties cannot agree upon the evidence from which any objection may arise, the officer shall furnish a copy thereof to the party requiring the same, or he may be compelled so to do, on the order of a Judge. On application to a Judge on motion or petition to confirm the report, or upon fourteen days notice to the opposite party by the party objecting, the exceptions shall be heard and decided, without reference back to the officer, unless the case require further investigation by him; but in no case shall a reference back to the officer be ordered when the defective matter can be supplied by direct investigation of the Judge.

9. The Solicitors of the parties may issue subpœnas for the atttendance of any witnesses, with or without the production of writings, before any officer authorized to take any examination, without an authority from him, on being signed and sealed by the Clerk; and for any disobedience of any witness thereto, or for refusing to answer lawful questions before the officer, a Judge may grant an attachment against such witness, and unless good cause be shewn, may order him to be committed on such attachment, or make such other order as may be reasonable.

Chapter 4.

Of Infants and Guardians.

Section.

1. Guardian for Infant, how appointed.
2. Infant seized in trust, how to convey.
3. Specific performance of contract, how compelled by Infant.
4. Sale or disposal of Infant's lands, how effected.
5. Conveyance of, when valid, and report required.
6. Infant, when deemed a Ward of the Court.
7. Sale not to alter the kind of property.
8. Conveyance, what evidence.

Section.
9. Officer's report as to Guardians, how confirmed, and recognizance filed, &c.
Section.
10. In what cases Guardians may be appointed without reference.

1. A guardian may be appointed for the defence of an infant in any suit in the said Court, on petition (*c*) of the infant, and proof by affidavit of his signature freely given, together with the consent of the guardian written thereon, and proved in like manner. If the infant be not of sufficient age to write, his name may be subscribed to the petition by one of his nearest relations.

(*c*) As to what the petition should contain where a reference would be necessary, *vide ante*, p. 14.

2. Whenever any infant shall be seized or possessed of any lands, tenements, or hereditaments, by way of mortgage, or in trust (*d*) only for others, any Judge, on petition of the guardian of such infant, or of any person interested, may by order enable and compel such infant to convey the same to any other person as may be therein directed. Every conveyance made pursuant to such order shall be as effectual as if made by such infant when of lawful age.

(*d*). Declared to extend to and include implied and constructive trusts. 26 Vic. c. 16, s. 12, *post*.

3. Any Judge, on petition of the executor of the estate of any person who may have died before the performance of any contract made by him in his life time, or of any person interested in such contract, and on hearing the parties, may compel the specific performance thereof by any infant, heir, or other person.

4. An infant seized of real estate, or entitled to any term of years in any lands, may by his next friend or guardian, petition a Judge for an order to sell or dispose of the said property, who shall proceed in a summary way on affidavits to enquire into the merits of such application, and if the disposal of such property or any part thereof be necessary for the support of such infant, or for his education, or if the interest of the infant will be substantially promoted by such disposal, on account of any part of his said property being exposed to waste or dilapidation, or being wholly unproductive, or for any other reasonable cause, the Judge may, on the filing of a bond by such guardian or next friend, or other person approved by the Judge in case he be not already a lawfully appointed guardian, with such sureties and in such form as shall be directed, order the letting for a terms of years, the sale, or

other disposal of such real estate, or interest, by such guardian or next friend, in such manner and with such restrictions as shall be deemed expedient, but not in any case contrary to any last will or conveyance by which such estate or term was devised or conveyed to such infant.

5. All sales, leases, and conveyances, made in good faith by any guardian or next friend in pursuance of such order, shall be as effectual as if made by such infant if of full age, and it shall not be necessary in the conveyance to recite any part of the proceedings required by this Chapter, but the same shall briefly refer to the order, and the sale, leasing, or other disposal of such property. The officer making the sale shall file a report thereof with the Clerk.

6. Upon any order for the sale of any property being made as aforesaid, the infant to whom the same shall belong shall be considered, so far as relates to such property, a Ward of the Court, and any Judge may make such order for the investment, disposal, and application of the proceeds of such property, and of the increase and interest arising therefrom, as shall secure the same for the infant's benefit.

7. No sale made as aforesaid shall give to such infant any other or greater interest or estate in the proceeds of such sale than he had in the estate so sold.

8. Every conveyance made under the above provisions, duly acknowledged, or proved, and registered, shall be evidence that all the proceedings on which the same is founded were rightly had.

9. On petition, or motion without petition, to confirm the officer's report, the same may be confirmed accordingly, and the recognizance (*e*) to be taken on the appointment of any guardian shall be filed with the Clerk, and be subject to such orders touching the recovery of the amount, or any part thereof, in case of any breach of the same, as a Judge shall think fit.

(*e*) For form of recognizance, see Allen's Rules, p. 120.

10. In cases where it is made to appear on affidavit that the whole property of an infant does not exceed one thousand pounds, (*f*) and the nature, description, and value of the property, real and personal, shall be specifically set forth in the petition, together with the names of the infant's relatives, a guardian may be appointed on the presentment of the peti-

tion with an affidavit of its truth, without reference, if the Judge to whom the same is presented shall think fit so to order.

(*f*) The amount was formerly fixed by Rule of Court at three hundred pounds, *ante*, p. 15.

Chapter 5.

Of the Foreclosure of Mortgages.

Section.

1. Decree for foreclosure and sale of mortgaged premises, how obtained, and proceedings thereon.
2. Conveyance thereon, how to be made, and with what effect.
3. Proceeds of sale, how to be applied.
4. Payment, when to stop foreclosure.
5. If sale ordered of whole of mortgaged premises, and any instalment not due, how to proceed.
6. Subsequent incumbrances, when part not due, how to proceed.
7. Foreclosure without sale, proceedings thereon.
8. When the mortgage money shall be paid at any time, how to be discharged on Registry.

1. Whenever a Bill shall be filed in the Supreme Court in Equity for the foreclosure and sale (*g*) of mortgaged premises, any Judge shall have power to decree a sale of the same, or such part thereof as may be sufficient to discharge the amount due on the mortgage with the costs of suit, and on fourteen days notice given to the opposite party, which may be included in the notice (*h*) of hearing, shall proceed to assess the amount due on such mortgage, whereupon an order shall be made requiring an officer, to be appointed as aforesaid, to proceed to the sale of the mortgaged premises decreed to be sold, reciting such premises and stating the amount found due; and the said officer shall advertise such sale at public auction in one or more of the public Newspapers of the County where the premises are situate, or if no Newspaper be published in such County, in the Royal Gazette, for not less than three months prior to the day of sale, and by printed handbills, one of which shall be posted up at the Court House, one at the Registry Office, and one in some public place in the Parish where the lands are situate, specifying in such advertisement the time and some public place for such sale, and then and there may sell or cause the same to be sold to the highest bidder. If the officer shall find it necessary for want of purchasers or other good cause to postpone such sale, the postponement shall be at least for one month, and shall be noticed during that time at the foot of the former advertisement or otherwise as the said officer may think

proper, and so on in case of any subsequent postponement; but nothing herein shall prevent an order of reference in the case of long or complicated accounts respecting such mortgage; and when the officer shall ascertain the amount due (*i*), he shall proceed to the sale in the manner herein before directed, subject to any order of a Judge which may be made respecting the same.

(*g*) Before the passing of 2 Vic. c. 28, *post*, there was no power vested in the Court of Chancery to order a sale in a suit for the foreclosure or satisfaction of a mortgage; under the provisions of that Act, the Rules of Court made in reference thereto (*ante* pp. 20, 21, 27, by virtue of 2 Vic. c. 35, *post*,) and the English practice, when not modified by either of these, all proceedings in such suits were carried on. 1 Smith, Ch. Pr. 530.

The 48th sec. of 15 & 16 V. c. 86, which provides for the sale of mortgaged premises instead of foreclosure, differs materially from the provisions of this Act, and the decisions under it are so qualified with the discretion given to the Court and the consent of parties interested, that very few of these would be found applicable here.

It has been held by V. C. Stuart, that mortgagees in trust may, under the said 48th section, file a bill for an account of what is due to them, and for a sale, although the mortgage contains a power of sale, and a foreclosure is not prayed for by the bill. Hutton v Sealey, 4 Jur. N. S. 450; 6 W. R. 350. See also Sporle v Wheyman, 20 Beav. 607; M'Rae v Ellison, 4 Jur. N. S. 967. As to cases where bill is taken *pro confesso*, see Green v Harrison, 4 W. R. 696.

The Court will not under this section order a sale on an interlocutory application, Wayn v Lewis, 1 Drew. 487; 22 L. J. Ch. 1051; and in the same case it was said that a sale cannot be directed after a decree of foreclosure, even on the application of the mortgagee; Girdleston v Lavender, 9 Hare, app. liii; but in Laslett v Cliffe, 2 Sm. & G. 278, V. C. Stuart considered that the Section gave power to direct a sale after a decree for foreclosure had been made, being of opinion that the Court ought not, when the plaintiff had obtained a decree, to insist upon his proceeding against his will on a decree which he obtained for his own advantage, when he preferred a different course authorized by the Legislature. Cf. Cook, 2 Cholmondely, 5 W. R. 335.

(*h*) Notice not necessary when bill taken *pro confesso* for want of appearance, unless defendant apply for reference to a Barrister. 26 Vic. c. 16, s. 7, *post*.

(*i*) See Rules *ante*, pp. 20, 24. If the Legislature intended that the officer should, without making a report of his doings, proceed to a sale, it would virtually abolish the practice which gave the opposite party an opportunity of taking exceptions to the report, and would in fact make officers' proceedings final and conclusive. It would seem rather, that they intended to direct the sale to be made *after* the officer's report had been confirmed and an order of the Court passed for such sale. See as to confirming officer's report, *ante*, p. 71.

2. Immediately upon such sale the said officer shall execute in his own name as such officer, and deliver to the purchaser, a conveyance of the land so sold, which conveyance shall briefly refer to the said decretal order, the advertising, and the sale, and then proceed to convey the same to the said purchaser, which conveyance shall vest in the purchaser the same estate as would have vested in the mortgagee, if the equity of redemption had been foreclosed, and such deed shall be a bar against all parties to the suit in which such

decree was made, and all claiming under them (*k*); and every such conveyance, duly acknowledged or proved and registered in the Registry Office of the County where the lands lie, shall be evidence of the execution, and that all the proceedings on which such conveyance was founded were rightly had.

(*k*) See 26 Vic. c. 16, s. 11, where in any case a decree or order shall direct the sale of land, every person seized or possessed of such land, or entitled to any contingent interest therein, being parties to the suit or otherwise bound by the decree or order, shall be deemed a Trustee, and the Court may make an order vesting such lands in any person they think fit, &c.

3. The proceeds of every sale made under the decree aforesaid shall be applied to the discharge of the debt and costs, and if there be a surplus it shall be brought into Court for the use of the person entitled thereto, subject to the order of any Judge, to be made on petition or motion and affidavit, with production of the mortgage or other securities, and notice to other parties interested, or otherwise, as may be ordered.

4. When any suit shall be brought for the foreclosure and sale, or foreclosure alone of any mortgage, the defendant may pay to the plaintiff at any time before sale or foreclosure absolute, the principal and interest with costs, and thereby terminate the suit; but if a decree of sale or foreclosure shall have passed, and any further amount may thereafter be due thereon, the same shall stand as a security for such further sum, and upon any subsequent default of payment, may be enforced by the further order of a Judge for the sale or foreclosure of the mortgaged premises, as the case may be, or of such part thereof from time to time, as shall be necessary, until the amount secured by the mortgage and the costs of the proceedings therein shall have been fully satisfied.

5. If it shall appear to a Judge that the sale of the whole mortgaged premises will be most beneficial to the parties, the decree shall be entered accordingly, or the Judge, if a reference be ordered, may direct the same to be ascertained by the officer, when the proceeds shall be applied as well to the payment of the amount due with the costs, as towards the residue not due at the time of sale; and if such residue do not bear interest, the Judge may direct the same to be paid with a deduction of the legal interest for the time during which such residue shall not be due.

6. Where subsequent incumbrances affect any mortgaged premises which may be sold under decree, the residue of the proceeds remaining after the discharge of the first mortgage, shall be subject, under the order of a Judge, to such subsequent incumbrances according to their priority, whether the same be due or otherwise, and to the like deduction of interest as in the last preceding Section.

7. When any foreclosure shall be decreed, the order for the same shall allow such time for the payment of the money due, with interest and costs, as the Judge shall direct, not to be less in any case than three months, the amount of principal and interest up to the time of payment to be ascertained by him as in the case of a foreclosure and sale, and on non-payment of the amount so found due with the costs, and proof thereof by affidavit, any Judge on motion or petition may order the decree of foreclosure to be made absolute, unless on good cause shewn by affidavit and previous notice to the plaintiff, a Judge may order a further extension of the time for payment of the money due, in which case such extension shall be allowed on such terms as may be prescribed, and so on as often as may be deemed necessary.

8. When the principal and interest of any mortgage, together with the costs (if any) shall be paid by the mortgagor or any person claiming under him, whether the same shall be in suit or otherwise, a Judge may, on satisfactory proof by affidavit of such payment, and on hearing the opposite party, order the mortgagee or person receiving the money to enter satisfaction in the Registry Office where registered, or subscribe and acknowledge a certificate in discharge thereof, such entry or certificate having been first demanded at the cost of the applicant and refused, and may also award costs to such applicant, or prescribe such other terms as the Judge may think just. If the party disobey such order, the Judge, on proof thereof by affidavit, shall direct the Registrar of Deeds, at the cost of the party applying, to enter the satisfaction in the same manner as if done by the party himself, and to enter the order in the registry books referring to the said satisfaction.

Chapter 6.

Of Partition of Lands.

Section.
1. Partition of lands, how to be effected.
2. How, if infant be a party.
3. Commissioners, how to be appointed.
4. Partition, how to be made where interests minute.
5. Decree of Partition, how to pass title.

1. The partition of lands, tenements, and hereditaments, held in co-parcenary, joint tenancy, or tenancy in common, shall be effected by the Supreme Court in Equity. (*l*)

(*l*) Partition was provided for formerly in this Province by 50 G. 3, c. 7, under which Act the Supreme Court, upon petition, examined the claims of the parties, and having determined their respective rights, "awarded a writ of partition as nearly as might be in the form for that purpose established in the register of judicial writs." By 52 G. 3, c. 19, this Act was amended, and it was enacted that all proceedings at law for partition should commence by writ issuing out of the Supreme Court, as nearly as may be in the form of the writ of partition issuing out of the Court of Chancery in England; and after directing the mode of proceedings in case of non-appearance, as well as after the tenants appeared to the writ, the actual partition was directed to be made in the same manner as was provided for by 50 G. 3, c. 7. This last mentioned Act has not been expressly repealed, but by 2 Vic. c. 36, s. 1, (repealed Act, *post*) it was provided that partition should "be effected by the Court of Chancery according to the practice or proceedings established or to be established in that Court; 2 Vic. c. 35, s. 13, *post*), provided that the rules of practice in the High Court of Chancery in England, as then existing, where not modified by local provisions, should be the practice of the Court of Chancery in this country. See as to English practice at this time, 2 Dan. Ch. Pr. 769, *et seqq.*; 1 Grant Ch. Pr. 49; Smith Ch. Pr.

This section simply states that the "Supreme Court in Equity" shall make partition of lands, but it says nothing of the proceedings therefor before the order for a commission to issue; it would seem therefore, that the proceedings to be had prior to the commission, as well as in all other particulars, when not regulated by this Chapter, should be carried on in the same manner in the Supreme Court in Equity, as formerly before the M. R. in Chancery. See 2 Vic. c. 36, *post*.

2. If in any proceeding for a partition, an infant be a party, any Judge may appoint a guardian for such infant.

3. On the order for a Commission in partition, the Judge shall appoint three disinterested Commissioners to make the partition, subject to any reasonable objection by either party.

4. When from the minuteness of the parties' interests in the estate the Commissioners may find it difficult to make a beneficial partition thereof, they may sell the same by portions or otherwise at public auction to the highest bidder, giving not less than one month's previous notice in a Newspaper of the County where the land lies, or if none be published there, in the Royal Gazette, and convey the same to the purchaser; and they shall forthwith make a return of their doings, with their opinion as to the value of the several portions directed to be partitioned, to enable the Judge on the confirmation of the return to decree the payment of the

several shares according to the proportions so certified. The conveyance made according to the provisions of this Chapter shall be valid notwithstanding any defects in the return of the Commissioners, and when acknowledged or proved, and registered in the Registry Office of the County, the same, or a copy thereof as in other cases, shall be evidence that all the proceedings on which such conveyance is founded were rightly had.

5. The decree of a Judge whereby any portion of lands held in co-parcenary, joint tenancy, or tenancy in common, shall be decreed in severalty, shall transfer to such co-parcenor, joint tenant, or tenant in common, all the right, title, and interest of the other parties interested therein, as well infants and married women, as others being parties to such proceedings; but a memorial of such decree shall be made and registered.

Chapter 7.

Of the repeal of Statutes.

Section.
1. Acts specifically repealed.
Section.
2. When this Act to come into operation.
Schedule.

1. The following Acts of Assembly, passed in the several years of the respective Reigns hereinafter mentioned, shall be repealed as soon as this Act comes into operation:—

48 G. 3, c. 2. An Act for making Process in Courts of Equity effectual against persons who reside out of this Province and cannot be served therewith.

50 G. 3, c. 1. An Act to authorize the Sheriff, or other executive officer serving Process at the Parish of Saint Martins, to convey any prisoner there arrested to the Gaol in the City of Saint John by way of the public road leading through part of King's County.

52 G. 3, c. 19. An Act to amend an Act intituled *An Act to provide for the more easy partition of Lands in Co-Parcenary, Joint Tenancy, and Tenancy in Common.*

3 W. 4, c. 19. An Act in addition to an Act for making Process in Courts of Equity effectual against persons who reside out of this Province and cannot be served therewith.

1 V. c. 8. An Act to authorize the appointment of a Master of the Rolls to the Court of Chancery in this Province and to provide for such officer.

2 V. c. 28. An Act to authorize the sale of Mortgaged Premises by the Court of Chancery, and directing the application of the proceeds thereof.

2 V. c. 29. An Act relating to the sale and disposition of the Real Estate of Infants.

2 V. c. 35. An Act for the improvement of the Practice in the Court of Chancery.

2 V. c. 36. An Act relating to the partition of Lands, Tenements and Hereditaments, held in Co-Parcenary, Joint Tenancy, and Tenancy in Common.

2 V. c. 37. An Act in amendment of the Act relating to the appointment of a Master of the Rolls in the Court of Chancery.

10 V. c. 39. An Act to simplify the proceedings in the Court of Chancery in certain cases.

2. This Act shall come into operation on the first day of September in the year of our Lord one thousand eight hundred and fifty four.

SCHEDULE.

TABLE OF FEES.

First—Examiner or other Officer.
Second—Clerk.
Third—Solicitor.
Fourth—Counsel.
Fifth—Sergeant-at-Arms.
Sixth—Sheriff.

Examiner, or other Officer.

	£	s	d
Summons, ...	0	2	0
Copies of all writings before the Examiner or other officer, per folio, ...	0	0	6
Report or certificate on hearing, ...	1	0	0
If above ten folio, for every additional folio, ...	0	1	6
Report or certificate on petition or motion, ...	0	10	0
If exceeding five folio, for every additional folio,	0	1	6
Every recognizance, per folio, ...	0	1	6
An examination fee for each person, ...	0	3	0

Every exhibit signed by an Examiner or other officer, every person shewn to, each ...	0	1	6
Every exemplification examined by said Examiner,	0	3	0
Preparing and executing conveyance of land, ...	1	3	4
For every folio in the conveyance above ten folio,	0	2	0
Preparing advertisement of sale of land, or any other purpose, ...	0	5	0
Attending a public sale under his direction, ...	1	3	4
Examining and settling a conveyance to be executed by another, ...	0	11	8
Swearing a witness, ...	0	1	0
Appointing time and place for his examination,	0	1	6
Taking interrogatories and depositions, per folio,	0	2	0
Certifying the examination, ...	0	2	6
Swearing a party to bill, answer, or other pleading,	0	2	0
Short attendance on summons, ...	0	6	8
Attendance over one, not exceeding two hours,	0	13	4
Attendance over two hours, not exceeding four hours	1	0	0
Every recognizance taken by him, ...	0	3	6

Clerk.

Drawing and entering all orders and rules, per folio, ...	0	2	0
Filing and entering any bill, answer, or other pleading, ...	0	2	3
Filing every report or other paper, ...	0	1	0
Copies of all orders and reports, per folio, ...	0	1	0
Drawing and engrossing on parchment, and copying on paper, same fee as Solicitor for the like services.			
Signing every copy of affidavit, ...	0	1	0
Do. certificate, ...	0	2	3
Setting down a cause for hearing, or on motion paper, ...	0	1	0
Every decree and dismission, ...	0	5	0
Every search, ...	0	1	0
Entering attachments, for each person, ...	0	0	6
Do. of all amerciaments, ...	0	1	0
Do. appearances, ...	0	2	0
Signing and sealing any process, ...	0	1	6
Every paper read in evidence, ...	0	0	6
Taxing a bill of costs, ...	0	3	6

Solicitor.

Retaining fee in each cause, ...	0	15	0
Drawing bill, answer, plea, demurrer, or other writing not otherwise provided for, per folio,	0	1	0
Engrossing, per folio, on parchment, ...	0	0	8
Copy, per folio, ...	0	0	6
Fee for each term, only four allowed, ...	0	5	0
Attending to get petition answered, ...	0	6	8
Do. Court on every common motion, ...	0	3	4
Do. on every special motion, ...	0	6	8
Copy of every order, per folio, ...	0	0	6
Serving the same, ...	0	3	4
Attending the Court on every hearing or argument,	0	15	0
Abbreviating bill, answer, or other proceeding, per folio, ...	0	0	4
Every process, ...	0	5	0
Every copy, ...	0	2	6
Attending Clerk on every Decretal order, ...	0	6	8
Serving all papers, ...	0	1	0
Attending Examiner to file any charge or discharge, ...	0	3	4
Do. on summons or adjournment, ...	0	6	8
For all other services the like fees as are allowed to Attorneys on the Common Law side of the Supreme Court.			
Postage actually incurred.			
The Solicitor General to have one fourth more in cases that concern the Crown.			

Counsel.

Retaining fee, ...	1	0	0
Perusing and signing a bill, answer, plea, demurrer, or other special pleading, interrogatories or exceptions, ...	1	0	0
Every motion of course, ...	0	10	0
Every special motion, ...	0	15	0
Arguing every plea, demurrer, or other special matter before the Court or on the hearing, fee at the discretion of the Court.			
Attending the examination of, and examining each witness, ...	0	5	0

Counsel fees on special matters, where their assistance is necessary and not otherwise, provided for, at the discretion of the Court, on the Examiner's certificate.

Sergeant-at-Arms.

Taking a prisoner into custody, ...	0	13	4
Mileage, per mile, ...	0	0	3
Serving summons to attend an Examiner, ...	0	1	0
Serving process, ...	0	2	6

Poundage, as on process at Common Law.

Sheriff.

The same as at Common Law.

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18 VICTORIA, CAP. IX.

An Act concerning Tender in Actions at Law and Suits in Equity.

Section.
1. Consent to judgment for a sum certain.
2. Costs, if no more be recovered.
3. No consent not accepted to be evidence.

Passed 3rd April 1855.

Be it enacted by the Lieutenant Governor, Legislative Council, and Assembly, as follows:—

1. From and after the passing of this Act, whenever any defendant in any Action at Law, or in any Suit in Equity, wherein debt or damages only are sought to be recovered, pending (a) in any Court in this Province, shall file in the office of the Clerk of the Court in which such suit or action is pending, or with the Justice in case the suit is pending in the Court of any Justice of the Peace, an offer and consent in writing to suffer judgment by default, and that judgment shall be rendered against him as debt or damages for a sum by him specified in the said writing, the same shall be entered of record, together with the time when the same was tendered, and the plaintiff or his Attorney may, at any time within ten days after he has received notice of such offer and consent, file as aforesaid a memorandum in writing of his acceptance of judgment for the sum so offered as debt or damages, and judgment may be entered up accordingly, with costs; or if after such notice any Judge of the Court in which such offer shall be made, shall for good cause grant the plaintiff a further time to elect, then the plaintiff may

signify his acceptance as aforesaid, at any time before the expiration of the time so allowed, and judgment may be rendered upon such acceptance as if the acceptance had been within ten days as aforesaid; provided always nevertheless, that nothing herein contained shall extend or be construed to extend to actions of replevin.

(*a*) An offer to suffer judgment by default may be filed under this Act before the declaration is filed. Gibson v Bateman, 4 Allan, 598. As to whether the plaintiff would be entitled to costs on filing a declaration for judgment, the Court gave no opinion.

2. Whenever in the final disposition of any such suit or action as is named in the preceding Section, such offer and consent as is therein named shall have been made by the defendant, and the plaintiff shall not recover a greater sum than the sum so offered, not including interest on the sum recovered in debt or damages from the date of such offer, the defendant shall have judgment against the plaintiff for his costs by him incurred after the date of such offer, and execution shall issue therefor; and the plaintiff, if he shall recover any debt or damages, shall be allowed his costs only up to the date of such offer and consent.

3. No offer or consent made in accordance with the aforegoing Sections, which shall not be accepted, shall be evidence against the party making the same, either in any subsequent proceeding in the action or suit in which such offer is made, or in any other action or suit.

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26 VICTORIA, CAP. XVI.

An Act to amend the Act relating to the administration of Justice in Equity.

Section.

1. Bill in Equity not to be sworn to, except in Injunction cases.
2. Bills filed for injunction to be sworn to, or facts proved by affidavit.
3. Causes set down for hearing on 14 days' notice, without publication of evidence. 17 V. c. 18, s. 16, sub-chapter 2, repealed.
4. Amount claimed to be endorsed on Summons in suits for foreclosure of Mortgages.
5. Bill taken *pro confesso* without notice of motion, if no appearance.
6. Causes heard *viva voce* after issue joined, on 14 days' notice. Power of Judge to postpone hearing.
7. Judge to assess amount due in foreclosure suits, without notice, where Bill taken *pro confesso*, unless defendant applies for reference.
8. Memorial of absolute decree of foreclosure to be registered; certified copy to be evidence.
9. Facts occurring after commencement of suit, to be added to Bill as an amendment.
10. Power of Court to order sale of real estate in suits for administration of estates of deceased persons.
11. Any decree made for sale of land, the person entitled thereto, and bound by the decree, to be a Trustee.
12. Provisions of 17 V. c. 18, sub-chapter 4, s. 2, to extend to constructive trusts.
13. Persons interested in questions cognizable in equity, to state special case for opinion of the Court.
14. Form of special case, and authority of Court thereon.

Section.
15. How filed and set down for hearing.
16. Parties thereto subject to jurisdiction of the Court.
17. Court to determine questions raised, and declare opinion, without administering relief. Court may refuse to determine question.
18. Executor, &c. protected, when acting in conformity with decree made on a special case.
19. Costs of special case.
20. Suits pending, not affected by first seven Sections hereof.
21. Parts of Act 17 V. c. 18, inconsistent herewith, repealed.
22. Process to be served by Coroner.
23. Books or writings used on a reference, to be evidence before the Court.
Schedule of Form.

Passed 20th April, 1863.

BE it enacted by the Lieutenant Governor, Legislative Council, and Assembly, as follows:—

1. That so much of the fourth Section of Sub-Chapter 2 of an Act passed in the seventeenth year of Her Majesty's Reign, intituled *An Act relating to the administration of Justice in Equity*, (*b*) as requires the bill to be sworn to by the plaintiff or his agent, is hereby repealed, except as hereinafter provided.

(*b*) See sec. 4, Sub-Cap. 2, *ante*, p. 39.

2. In Injunction causes the bill may be sworn to as directed by the said Act, or if not sworn to, the facts stated in the bill may be proved by affidavit, according to the practice of the Court of Chancery in this Province prior to the passing of the said Act. (*c*)

(*c*) See sec. 5, Sub-Cap. 2, *ante*, p. 39.

3. The sixteenth Section (*d*) of Sub-Chapter 2 of the before recited Act is hereby repealed; and in lieu thereof, be it enacted,—When evidence shall be taken before an Examiner, or the plaintiff proceeds after issue, on evidence furnished by the answer, or the defendant on evidence furnished by the plaintiff's answer to defendant's interrogatories, it shall not be necessary to move for publication; but on fourteen days' notice by either party, the cause may be set down for hearing at Fredericton, and the evidence may be used without delivering out copies thereof at such hearing.

(*d*) See *ante*, p. 46.

4. In any suit commenced for the foreclosure (*e*) of any mortgage, the date of such mortgage and the names of the parties thereto, shall be stated in the summons and copy served, and the amount which the plaintiff claims shall be indorsed on such summons and copy, (*f*) in the following form, or to the like effect:—"The plaintiff claims £—— for principal on the within mentioned mortgage, and £—— for

interest, from [*date of Mortgage, or as the case may be,*] to [*date of Summons.*]

(*e*) Under the repealed Act, 2 Vic. c. 28, s. 1, *post*, it was expressly provided that on a bill filed for the *foreclosure or satisfaction* of a mortgage, the Court should have power to decree a sale; but under sec. 1, Sub-Cap. 5, *ante*, the words used are, whenever a bill shall be filed, for the *foreclosure and sale*, the Judge shall have power to decree a sale. It might be open to some doubt, whether this section renders the endorsement, &c. necessary on bills for foreclosure *and sale;* see sec. 4, Sub-Cap. 5, *ante*, p. 76, where a distinction is made between a suit for foreclosure only and for foreclosure and sale.

(*f*) See Summons *ante*, p. 64.

5. If the defendant in any suit does not appear within one month after the filing of the Bill, (*g*) the plaintiff may move that the Bill be taken *pro confesso*, without giving any notice of such motion; so much of the seventh Section of said Sub-Chapter 2, as requires fourteen days' notice of motion to be given to the defendant in case of no appearance, is hereby repealed. (*h*)

(*g*) This must mean one month after the time for appearance had expired, otherwise, where a bill is filed at the time the summons is issued, as in injunction cases it may be, the plaintiff would obtain a decree *pro confesso*, before the time given for appearance had expired. See sec. 4 & 7, Sub-Cap. 2, pp. 39, 41.

(*h*) See sec. 7, Sub-Cap. 2, *ante*, p. 41.

6. When a cause is at issue by filing a replication, (*i*) it may be heard on evidence taken *viva voce* in open Court at one of the Monthly Sittings, on fourteen days' notice thereof given by the plaintiff to the defendant or his Solicitor; provided that any Judge, on sufficient cause shewn, may order the postponement of such hearing, or that the cause may be heard at any Circuit Court, on such terms as he may think just.

(*i*) See sec. 15, Sub-Cap. 2, *ante*, p. 45.

7. When a bill filed for the foreclosure of a mortgage is taken *pro confesso* for want of appearance, a Judge may assess the amount due on such mortgage, without any notice thereof given to the defendant, unless such defendant apply for a reference to a Barrister. (*k*)

(*k*) See note (*e*) *supra*. and sec. 1, Sub-Cap. 5, *ante*, p. 74.

8. A Memorial (*l*) (A) of every absolute and unconditional decree of foreclosure, may be registered in the office of the Registrar of Deeds of the County where the lands mentioned in such decree are situated; and such Memorial, or a copy thereof, certified by the Registrar, shall be evidence of such decree, in all Courts in the Province.

(*l*) See sec. 38, Sub-Cap. 2, *ante*, p. 61, & sec. 2, Sub-Cap. 5, *ante*, p. 75.

9. (*m*) It shall not be necessary to file any supplemental bill (*n*) for the purpose only of stating or putting in issue facts or circumstances which may have occurred after the commencement of the suit (*o*); but such facts or circumstances may be introduced into the bill filed, by way of amendment, if the cause is in such a state as to allow of an amendment being made in the bill, (*p*) and if not, the plaintiff (*q*) shall be at liberty to state such facts or circumstances on the record, in such manner and subject to such rules with respect to the proof thereof, and the affording the defendant leave and opportunity of answering and meeting the same, as shall be prescribed by any general rule of the Court. (*r*)

(*m*) This is almost a verbatim copy of 53rd sec. of 15 & 16 Vic. c. 86.

(*n*) A petition is within the section; Robinson v Hewitson, 1 W. R. 100; 20 L. T. 154; when, therefore, a female petitioner married after the petition had been stamped and answered, it was held that the petition might be amended under this section, by making it the petition of the husband and wife, without a fresh stamp; *ib.* But a fact inconsistent with an existing order made upon a petition cannot be introduced by amendment. Re Keen, 7 W. R. 577.

(*o*) Before the acts, matter occurring after the institution of the suit could not be introduced on the record by way of amendment; and in such cases a supplemental bill, involving a new subpœna and a new answer was necessary; but the Court under this section gave leave to amend a bill after plea allowed by the introduction of supplemental matter which had occurred since the institution of the suit; Tudway v Jones, 1 K & J. 691; 24 L. J. Ch. 507.

In Commerall v Hall, 2 Drew. 194; 23 L. J. Ch. 631; 18 Jur. 141, it was said by V. C. Kindersley that this section did not apply at all after decree, and that it did not apply *before* decree to bringing new parties before the Court, but only to the settlement of new facts between the same parties. So in an administration suit when the reference to the Master had been already directed, and one of the parties, a defendant, had since died, and administration to his estate had been taken out, V. C. K. was of opinion that it would be necessary to file a supplemental bill against his administrator instead of appending a supplemental statement to the bill; Heath v Chapman, 17 Jur. 570; 1 W. R. 244; Cf. Heath v Lewis, 18 Beav. 527; but see contra, Hart v Tultz, 2 W. R. 131; 22 L. T. 192, in which case, however, a supplemental bill was afterwards filed. The second proposition laid down in Commerall v Hall, was followed in Williams v Jackson, 7 W. R. 104; 5 Jur. N. S. 264; and in Nicholson v Gibb, 2 W. R. 337.

(*p*) The amendments or supplemental statements must not be of such a nature as to contradict the case made by the bill; Tonson v Judge, 2 Drew. 414; 2 W. R. 574; 23 L. T. 217; but see Allen v Spring. 22 Beav. 615; and as to amendments of such a nature before the act, Marer v Dry, 2 S. & S. 113; Watts v Hyde, 2 Ph. 406; or alter the nature of the suit, *ex. gr.* by adding, Butterworth v Bailey, 15 Ves. 358; or striking out, Cholmondely v Clinton, 2 V. & B. 113; but see Severn v Fletcher, 5 Sim. 457, a prayer for relief after answer. But when a bill was filed asserting a legal right, which on the hearing the plaintiff was ordered to establish at law, it was held on appeal, reversing the decision below, that he might introduce by amendment facts existing before, but discovered after the institution of the suit, which it was alleged would render the trial at law unnecessary; Bolton v Riddsdale, 24 L. J. Ch. 70; 2 W. R. 488, overruling V. C. Stuart's decision in the same case, 2 W. R. 451; but see Mollett v Enequist, No. 2, 26 Beav. 466.

(*q*) This section does not enable a *defendant*, even though he have the conduct of a suit, to file a supplemental statement. Lee v Lee, or Lyr v Lyr, 9 Hare, xci; Langdale v Gill, 1 Sm. & G. 24; 16 Jur. 1041.

(*r*) No rules or orders have been made either under this section or any section of 17 Vic. c. 18, *ante*, prescribing the mode or manner of proceedings thereon, as has been done in England.

10. Whenever a decree shall have been made in a suit by a creditor, next of kin, or legatee, or other party, for the administration of the estate of a deceased person, and it shall appear that the personal estate is insufficient for the payment of the debts of such estate, the Court may direct a sale of the real estate (*s*) for that purpose; and in case the Court shall think fit so to order, the costs of the suit, or of such part thereof as may be so directed, may be ordered to be paid out of the proceeds of such sale.

(*s*) See sec. 31, Sub-Cap. 2, *ante*, p. 58.

11. When any decree or order shall have been made by the Court directing the sale of any land for any purpose whatsoever, every person seized or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby, or being otherwise bound by such decree or order, shall be deemed to be so seized or possessed or entitled (as the case may be) upon a trust; and in every such case it shall be lawful for the Court, if it shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such land, or any part thereof, for such estate, as the Court shall think fit, either in any purchaser, or in such other person as the Court shall direct; and every such order shall have the same effect as if such person so seized or possessed or entitled, had been free from all disability, and had duly executed all proper conveyances and assignments of such land for such estate.—[See 15 & 16 Vic. c. 55, s. 1.]

12. The word "trust" (*t*) in the second Section of Sub-Chapter 4 of the above recited Act, shall extend to and include implied and constructive trusts.

(*t*) See sec. 2, Sub-Cap. 4, *ante*, p. 72.

13. (*u*) It shall be lawful for any person interested or claiming to be interested in any question cognizable on the Equity side of the Supreme Court, as to the construction of any Act of Assembly, Will, Deed, or other instrument in writing, or any article, clause, matter or thing therein contained, or as to the title, or evidence of title, to any real or personal estate contracted to be sold, or otherwise dealt with, or as to the parties to, or the form of any deed or

instrument for carrying any contract into effect, or as to any other matter falling within the jurisdiction of the said Court, to concur in stating such question in the form of a special case (*v*) for the opinion of the said Court, in the manner and under the restriction hereinafter contained; and it shall be lawful for all executors and trustees (*w*) to concur in such case.

(*u*) This section is almost a literal copy of 1st sec. 13 & 14 Vic. c. 35, an Act to diminish the delay and expense of proceeding in the High Court of Chancery in England, designated as Sir George Turner's Act. In Mich. Term, 1865, the Supreme Court in Equity determined, without argument, that a special case could not be heard before the Court in Term, unless as an appeal case from the decision of one of the Judges.

(*v*) In deciding a special case, *the Court only expresses an opinion;* it does not bind the rights of the parties as upon a bill or claim; Bailey v Collett, 23 L. J. Ch. 230; it follows, therefore, that it should only be resorted to in cases of doubtful construction, and not upon questions of disputed rights, *ib.* But see Evans v Evans, 22 L. T. 43, 51; Schooder v Schooder, Kay, 578; 18 Jur. 621, 987; and Day v Day, *ib.* 1013. The facts must be fully and fairly stated on a special case, or the Court will make no order; Bulkeley v Hope, 8 DeG. M. & G. 36; 26 L. J. Ch. 240. Cf. Domville v Lamb, 9 Hare, app. 55, where V. C. Turner observed that "he could not upon a special case act upon inferences drawn by the parties. If the matter were before the Court on a *bill*, he might direct inquiries to ascertain facts of which the Court was not satisfied at the hearing, but such inquiries could not be directed upon a special case; and when the question was brought forward in that form, the special case must, with reference to any material point upon which the evidence was doubtful, state all the facts upon the subject which could be ascertained, and state and verify (if necessary) by affidavit, that no further evidence could be given on the subject, and upon that allegation and proof it must be left to the Court to judge of the result of the statement."

All persons beneficially interested in all the questions to be determined by a special case must be made parties, per V. C. Kindersley, in Entwistle v Cannon, 4 W. R. 450. Where, therefore, a married woman being entitled under a will to a share of £420, for her separate use, and also claiming, as one of the next of kin of the testator, a share of the general residuary estate, upon the ground that the residuary bequest was void for remoteness, sought to have those questions of construction determined by a special case, to which only the legatees of the £420, her husband, and the trustees, were parties, V. C. Kindersley refused to allow the cause to be set down under this Act; *ib.* See cases cited, *ante*, pp. 52, 55, 56, in notes *z*, *f*, *k*.

(*w*) In Darby v Darby, 18 Beav. 412, it was said that, where all the parties beneficially interested were made parties to a special case, the trustees ought to be omitted. But this case seems to be overruled by Vorley v Richardson, 8 DeG. M. & G. 126; 25 L. J. Ch. 335, 337; 2 Jur. N. S. 362.

14. (*x*) Every such special case shall be entitled as a cause between the parties interested, or claiming to be interested as plaintiff and defendant (*y*), and shall concisely state such facts and documents as may be necessary to enable the Court to decide the question raised thereby (*z*); and upon the hearing of such case, the Court and the parties shall be at liberty to refer to the whole contents of such documents; and the Court shall be at liberty to draw from the facts and documents stated in such case, any inference which the Court might have drawn therefrom if proved in a cause.

(*x*) This section combines the 7th & 8th sections of 13 & 14 Vic. cap. 35.

(*y*) When a creditor of a deceased person is named as plaintiff in a special case, the record should not be entitled "Between such creditor *on behalf of himself and all other creditors*, plaintiffs and defendants," such creditors not being before the Court, and therefore not bound by the proceedings. Lee v Head, 1 K. & J. 625.

(*z*) See cases cited in *note v, supra*. When a material fact had been inadvertently omitted in the special case, but appeared to be recognized by all parties, the Court introduced a preface before the order, stating the circumstances, from which it appeared that the fact in question had been so recognized. Lane v Debenham, 17 Jur. 1005.

15. Every such special case shall be signed by the Solicitors for the parties, and shall be filed with the Clerk of the Court, after which it may be set down for hearing, on fourteen days notice given by either party. (*a*)

(*a*) The 10th and 12th Sections of the English Act from which this Section is taken, provide that the special case shall be signed by Counsel for all parties and filed in same manner as bills are filed, and that after all the defendants shall have appeared, the same may be set down for hearing. In *ex parte* Craig 20 L. J. Ch. 136; 15 Jur. 762, it was held that the same Counsel might sign a special case for all the parties. It is enough if Counsel's signature be appended to the *draft*, Stapleton v Stapleton, 17 L. T. 15; *vide* Coppeard v Mayhew, 22 L. J. Ch. 408. The interests of infants should, however, at the hearing at least, be protected by different Counsel even where one Solicitor appears for all parties, Wright v Woodham, 17 L. T. 293.

16. After a special case shall have been filed, the parties thereto shall be subject to the jurisdiction of the Court, in the same manner as if the plaintiff in such special case had filed a bill against the party named as defendant thereto, and such defendant had appeared to such bill.

17. Upon the hearing of any such special case, the Court may determine the questions raised therein, or any of them, and by decree declare its opinion thereon, and so far as the case shall admit of the same, upon the right involved therein, without proceeding to administer any relief consequent upon such declaration; and every such declaration contained in any such decree, shall have the same force and effect as such declaration would have had, and shall be binding to the same extent as such declaration would have been, if contained in a decree made in a suit between the same parties instituted by bill (*b*); provided that, if upon the hearing of such case, the Court shall be of opinion that the questions raised thereby, or any of them, cannot properly be decided upon such case, the said Court may refuse to decide the same.

(*b*) *Vide* Lane v Debenham, 17 Jur. 1005, *supra*. The Court may refuse to make any decree or declaration, Bulkeley v Hope, 8 De G. M. & G. 36; 26 L. J. Ch. 240; or to answer some of the questions propounded, Barrington v Liddell, 2 DeG. M. & G. 480, 506, and the other cases cited in *note*, sec. 13, *supra*.

As to special cases between vendor and purchaser and the questions which the Court will or will not decide thereon, see Leslie v Thompson, 9 Hare 268, 15 Jur. 717; and Wilson v Bennett, 20 L. J. Ch. 279; and Comp. Edwards v Milbank, 4 Drew. 606; 7 W. R. 651.

It seems that the Court has no jurisdiction upon a special case to make binding declarations of future rights; Burt v Sturt, 1 W. R. 145; Greenwood v Sutherland, 10 Hare, app. xii; Garlick v Lawson, 10 Hare, app. xiv; Gosling v Gosling, 1 Jo. 265; Bell v Cade, 10 W. R. 38. But see Earl of Tyrone v Marquis of Waterford, 6 Jur. N. S. 507; 1 DeG. J. & F. 573. *Vide* note (*m*) *ante*, p. 56.

18. Every executor, trustee, or other person making any payment, or doing any act in conformity with the declaration contained in any decree made upon a special case, shall, in all respects, be as fully and effectually protected and indemnified by such declaration, as if such payment had been made, or act done, under or in pursuance of an order of the said Court made in a suit between the same parties instituted by bill, save only as to any rights or claims of any person in respect of matters not determined by such declaration.

19. The costs of the proceedings relating to any special case shall be in the discretion of the Court.

20. The first seven Sections of this Act shall not apply to suits now pending.

21. Any part of the above recited Act which is inconsistent with the provisions of this Act, is hereby repealed.

22. In Section 13 of Chapter 1 of the said Act, instead of process being directed to or served by all the Coroners of any County, the same may be directed to or served by any one of the Coroners of such County. (*c*)

(*c*) See *ante*, p. 37.

23. The books or writings mentioned in Section 5 of Chapter 3 of the same Act, when used in evidence on any reference under the said Section, shall be evidence to be used before the Supreme Court in Equity, or any Judge thereof, in the same manner as any other evidence taken in the same cause. (*d*)

(*d*) See *ante*, p. 70, also 27 Vic. c. 5, which provides that this section shall not apply to any suit or proceeding commenced or pending at the time of passing of this Act.

SCHEDULE A.

Supreme Court—Equity Side.

Between A. B. Plaintiff, and C. D. Defendant.

This is to certify that by a decree of this Court bearing date the day of , in the year one thousand eight hundred and , it was ordered that the said defendant

should be absolutely barred and foreclosed from all right and equity of redemption in and to the following described lands, [*describe the lands as set forth in the bill,*] being the land mentioned in the said plaintiff's bill.—Given under my hand and the Seal of the said Court this day of , A. D. 186 .

——————— *Clerk.*

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19 VICTORIA, CAP. XLI.

An Act in further amendment of the Law.

Section.

1. Crime or interest not to exclude from giving evidence: Plaintiff or defendant to be witnesses except as excepted, viz:—
2. In criminal proceedings—self-crimination—husband and wife.
3. Communications between husband and wife.
4. Proceedings in consequence of adultery.
5. Proof of foreign and other proclamations, treaties, judgments, &c.
6. Documents admissible in English Courts to be admissible in Provincial Courts.
7. Validity of affidavits for proceedings in this Province when made without the Province.
8. Proof of register of or declaration in respect of any British Ship, how may be made.
9. Penalty for wilfully certifying as true, false copies or extracts.
10. Courts, &c. authorized to hear evidence empowered to administer an oath to witnesses.
11. Penalty, &c. for forging, &c. seal or signature of certain documents.
12. Substitution of affirmation for an oath.
13. False affirmation deemed perjury.
14. Credibility of witness, how impeachable by party producing him.

Section.

15. Inconsistency on cross-examination, how to be established.
16. Examination of a witness as to previous written statements;
17. As to his conviction of a felony or misdemeanor.
18. Proof of instrument by an attesting witness, when unnecessary.
19. Comparison of disputed with genuine writing.
20. Affidavit in answer to affidavits involving new matter.
21. On hearing any motion or summons, production of documents or witnesses may be ordered;
22. Order to have force of Rule of Court; adjournment and conduct of proceedings.
23. Affidavits obtainable by Rule of Court when party refuses;
24. Proceedings on such order.
25. Production of documents in possession of adverse party.
26. Act 3 V. c. 65, as to proof of records and Letters Patent, extended to Crown inquisitions, judgments, &c. and records of Court of Chancery.
27. First four Sections of this Act to come in force on 1st January 1857.

Passed 1*st May*, 1856.

BE it enacted by the Lieutenant Governor, Legislative Council, and Assembly, as follows:—

1. On the trial of any issue joined, or of any matter or question, or any enquiry arising in any suit, action, or other proceeding in any Court of Justice, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence, no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest, from giving evidence either in person or by depo-

sition, according to the practice of the Court; and the parties thereto, and the person in whose behalf any such suit, action or other proceeding may be brought or defended, and the husbands and wives of the parties thereto, and the person in whose behalf any such suit, action or other proceeding may be brought or instituted, or opposed, or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the suit, action or other proceeding.

2. Nothing herein contained shall render any person who, in any criminal proceeding, is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself, or shall render any person compellable to answer any question intended to criminate himself; and nothing herein contained shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceeding, or in any proceeding instituted in consequence of adultery.

3. No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.

4. Nothing herein contained shall apply to any action, suit, proceeding, or bill, in any Court of Common Law or Court of Marriage and Divorce, instituted in consequence of adultery.

5. All Proclamations, Treaties, and other Acts of State (*e*) of any Foreign State or of any British Colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in the United Kingdom of Great Britain or Ireland, or in any Foreign State, or in any British Colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such Court, may be proved in any Court of Justice, or before any person having, by law or by consent of parties, authority to hear, receive and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned, that is to say: If the document sought to be proved be a Proclamation, Treaty, or other Act of State, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the Foreign State or

British Colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any British, Foreign, or Colonial Court, or an affidavit, pleading, or other legal document filed or deposited in any such Court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the said British, Foreign, or Colonial Court to which the original document belongs, or in the event of such Court having no seal, to be signed by the Judge, or if there be more than one Judge, by any one of the Judges of the said Court, and such Judge shall attach to his signature a statement in writing on the said copy, that the Court whereof he is a Judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature or of the truth of the statement attached thereto where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

(*e*) Acts of State shall be held to extend to all Acts or Statutes of any Legislature or other governing body of such Foreign State or British Colony. 21 Vic. c. 3, *post*. See also 22 Vic. c. 20, *post*, as to the construction of such Acts or Statutes, &c. by a Judge on a trial.

6. Every document which by any law now in force is or shall be admissible in evidence of any particular, in any Court of Justice in England, without proof of the seal or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice in this Province, or before any person having therein, by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

7. All affidavits for the purpose of holding persons to bail in this Province, or having relation to any judicial proceeding in any Court of Justice therein, purporting to be made before a Judge of any Court of Justice in the United Kingdom, or in any Foreign State, or in any British Colony, if

in other respects conformable to law and the practice of the Court in which they are designed to be used, may, notwithstanding they are made before a Judge of a British, Foreign, or Colonial Court, be received and acted upon, and shall have the same effect as if made before a Judge or other lawful authority in this Province, provided that the same purport to be sealed with the seal of the British, Foreign, or Colonial Court, before one of the Judges of which they purport to be made, or in the event of such Court having no seal, provided the Judge whose name is subscribed thereto shall have attached to his signature a statement in writing on the affidavit, that the Court whereof he is a Judge has no seal; but if any such affidavit shall purport to be sealed and signed, or to be signed without being sealed, as hereinbefore respectively directed, the same shall be respectively received and acted upon as aforesaid, and admitted in evidence in every Court of this Province, without any proof of the signature of the Judge and seal of the Court where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are alone required, or of the judicial character of the person appearing to have made such signature, or signature and statement respectively.

8. Every register of or declaration made, in respect of any British ship, in pursuance of any of the Acts relating to the registry of British ships, may be proved in any Court of Justice, or before any person having, by law or by consent of parties, authority to hear, receive, and examine evidence, either by the production of the original, or by an examined copy thereof, or by a copy thereof purporting to be certified under the hand of the person having charge of the original, and which person is hereby required to furnish such certified copy to any person applying at a reasonable time for the same, upon the payment of the sum of one shilling; and every register or copy of register, and also every certificate of registry granted under any of the Acts relating to the registry of British Vessels, and purporting to be signed as required by law, shall be received in evidence in any Court of Justice, or before any person having, by law or by consent of parties, authority to hear, receive, and examine evidence, as presumptive proof of all the matter contained or recited in such register, when the register or such copy thereof as

aforesaid is produced, and of all the matters contained or recited in or endorsed upon such certificate of registry when the said certificate is produced.

9. If any officer authorized or required by this Act to furnish any certified copies or extracts, shall wilfully certify any document as being a true copy or extract, knowing that the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanor, and be liable upon conviction to imprisonment for any term not exceeding three years.

10. Every Court, Judge, Justice, Officer, Commissioner, Arbitrator, or other person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.

11. If any person shall forge the seal, stamp, or signature of any document in this Act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall on conviction be liable to imprisonment for any term not exceeding three years, nor less than one year; and whenever any such document shall have been admitted in evidence by virtue of this Act, the Court or person who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and kept in the custody of some officer of the Court, or other person, for such period and subject to such conditions as to the said Court or person shall seem meet; and every person who shall be charged with committing any offence 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 the County, district, or place 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 laid and charged to have been committed in any County, district, or place in which the principal offender may be tried.

12. If any person called as a witness, or required, or desiring to make an affidavit or deposition, shall refuse or be

unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court, or a Judge, or other presiding presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following, videlicet:—

'I, A. B., do solemnly, sincerely and truly affirm and de-'clare, that the taking of any oath is, according to my reli-'gious belief, unlawful; and I do also solemnly, sincerely 'and truly affirm and declare,' &c.

Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.

13. If any person making such solemn affirmation or declaration shall wilfully, falsely, and corruptly affirm or declare any matter or thing, which if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws of this Province are or may be enacted or provided against persons convicted of wilful and corrupt perjury.

14. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the Judge prove adverse, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or no he has made such statement.

15. If a witness upon cross-examination as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or no he has made such statement.

16. A witness may be examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the cause, without such writing being shewn to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always, that it shall be competent for the Judge at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit.

17. A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction, and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the Clerk of the Court, or other officer having the custody of the Records of the Court where the offender was convicted, or by the deputy of such Clerk or officer, (for which certificate a fee of five shillings and no more shall be demanded or taken,) shall upon proof of the identity of the person be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

18. It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto.

19. Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and Jury as evidence of the genuineness or otherwise of the writing in dispute.

20. Upon motions founded upon affidavits, it shall be lawful for either party, with leave of the Court or a Judge, to make affidavits in answer to the affidavits of the opposite party, upon any new matter arising out of such affidavits,

subject to all such rules as shall hereafter be made respecting such affidavits.

21. Upon the hearing of any motion or summons it shall be lawful for the Court or a Judge thereof, at their or his discretion, and upon such terms as they or he shall think reasonable, from time to time to order such documents as they or he may think fit to be produced, and such witnesses as they or he may think necessary to appear, and be examined *viva voce* either before such Court or Judge; and upon such evidence to make such rule or order as may be just.

22. The Court or Judge may by such rule or order, or any subsequent rule or order, command the attendance of the witnesses named therein, for the purpose of being examined, or the production of any writings or other documents, to be mentioned in such rule or order; and such rule or order shall be proceeded upon in the same manner, and shall have the same force and effect as other rules or orders of the said Court now have, and be enforced in like manner; and it shall be lawful for the Court or Judge to adjourn the examination from time to time as occasion may require; and the proceedings upon such examination shall be conducted, and the depositions taken down as nearly as may be in the mode now in use with respect to the *viva voce* examination of witnesses.

23. Any party to any civil action or other civil proceeding in the said Court, requiring the affidavit of a person who refuses to make an affidavit, may apply by summons for an order to such person to appear and be examined upon oath before a Judge, or a person to whom it may be most convenient to refer such examination, as to the matters concerning which he has refused to make an affidavit; and a Judge may, if he think fit, make such order for the attendance of such person before himself or before the person therein appointed to take such examination, for the purpose of being examined as aforesaid, and for the production of any writings or documents to be mentioned in such order, and may therein impose such terms as to such examination, and the costs of the application and proceedings thereon, as he shall think just.

24. Such order shall be proceeded upon in like manner as other orders are now proceeded in, and the examination thereon shall be conducted, and the depositions taken down

and returned, as nearly as may be in the mode now used in *viva voce* examinations.

25. Upon the application of either party to any cause or other civil proceeding in the said Court, upon an affidavit by such party of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or a Judge to order that the party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body corporate, shall answer on affidavit, stating what documents he or they has or have in his or their possession or power, relating to the matters in dispute, or what he knows as to the custody such documents or any of them are in, and whether he or they objects or object (and if so on what ground) to the production of such as are in his or their possession or power, and upon such affidavit being made, the Court or Judge may make such further order therein as shall be just.

26. The provisions of an Act passed in the third year of the Reign of Her present Majesty, (*f*) intituled *An Act to amend the Law of Evidence in regard to the proof of Records and Letters Patent*, are hereby extended to all inquisitions, surrenders, escheats, leases, licences, judgments, and conveyances by, to, or from, or in favour of or against the Crown, and to the Records or Rolls of judgment and decrees heretofore had or obtained in the Court of Chancery by or against the Crown in this Province, or which may hereafter be had or obtained on the Equity side of the Supreme Court by or against the Crown.

(*f*) See 3 Vic. c. 65, *post.*

27. The first four Sections of this Act shall not come into operation until the first day of January in the year of our Lord one thousand eight hundred and fifty seven.

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22 VICTORIA, CAP. XX.

An Act relating to the Law of Evidence.

Questions as to construction of Foreign or British Colonial Statutes, how to be dealt with.

Passed 13*th April*, 1859.

Be it enacted and declared by the Lieutenant Governor, Legislative Council, and Assembly,—When upon the trial of

any cause, civil or criminal, any question shall arise upon the true meaning or construction of any Statute, Act, or Ordinance of any Foreign State or Government, or of the Legislature of any British Colony, Island, or Possession, it shall not be deemed misdirection in the Judge, before whom such trial may be pending, to express his opinion to the Jury upon such meaning or construction in its bearing upon or application to the issue or matter before him for trial, but a Bill of Exceptions may be tendered to the Judge, to be by him sealed as in other cases, or the Court may review and deal with the matter in like manner as if the question had arisen under an Act of the General Assembly of this Province; provided always, that no evidence in relation to the construction or meaning of any Foreign or Colonial Law, which would be admissible before the passing of this Act, shall be excluded by reason hereof.

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27 VICTORIA, CAP. XL.

An Act relating to Affidavits, Declarations and Affirmations made out of this Province for use therein.

Section.

1. Appointment of persons to take Affidavits, &c. out of the Province, how made.
2. Title of Commissioners.
3. Affidavits, &c. taken before certain parties, to be valid.
4. Documents signed and sealed by Commissioners, to be evidence without proof of such signature.

Section.

5. Affidavit of any Deed, &c. for registration, how made.
6. Informality in form of document not to affect as evidence.
7. Tendering false or counterfeit documents; penalty.
8. This Act not to affect Sec. 7, 19 Vic. cap. 41.
9. Not to affect Affidavits &c. heretofore made.

Passed 13*th April*, 1864.

Be it enacted by the Lieutenant Governor, Legislative Council, and Assembly, as follows:—

1. The Lieutenant Governor in Council, by one or more Commission or Commissions under his hand and seal, from time to time shall and may empower such and so many persons as he may think fit and necessary, to administer Oaths and take and receive Affidavits, Declarations and Affirmations in the United Kingdom of Great Britain and Ireland, or in any Colony or Dependency thereof, or in any Foreign State or Country, in or concerning any cause, matter or thing depending in, or in any wise concerning any of the proceedings had or to be had in Her Majesty's Supreme Court of Judicature, at the law or equity side thereof, or in

any of the Inferior Courts of Common Pleas, or in any Surrogate's Court, or in any other Court of Record in this Province, whether now existing or hereafter to be constituted; and every Oath, Affidavit, Declaration or Affirmation taken or made as aforesaid, shall be as valid and effectual, and shall be of the like force and effect to all intents and purposes, as if such Oath, Affidavit, Declaration or Affirmation had been administered, taken, sworn, made or affirmed before a Commissioner for taking Affidavits therein, or other competent authority of the like nature.

2. The Commissioners so to be appointed shall be styled Commissioners for taking Affidavits in and for the Courts in the Province of New Brunswick.

3. Oaths, Affirmations, Affidavits or Declarations administered, sworn, affirmed or made out of the Province of New Brunswick, before any Commissioner authorized by the Lord Chancellor to administer oaths in Chancery in England, or before any Notary Public, certified under his hand and official seal, or before the Mayor or Chief Magistrate of any City, Borough or Town Corporate in Great Britain or Ireland, or in any Colony of Her Majesty, or in any Foreign State or Country, and certified under the Common Seal of such City, Borough or Town Corporate, or before a Judge of any Court of supreme jurisdiction in any Colony belonging to the Crown of Great Britain and Ireland, or any Dependency thereof, or before any Consul, Vice-Consul, Acting Consul, Pro-Consul, or Consular Agent of Her Majesty, exercising his functions in any foreign place, for the purposes of, and in or concerning any cause, matter or thing depending or in any wise concerning any of the proceedings to be had in any of the said Courts of this Province, shall be as good, valid, and effectual, and shall be of like force and effect to all intents and purposes, as if such Oath, Affirmation, Affidavit or Declaration had been administered, sworn, affirmed or made in this Province, before a Commissioner for taking Affidavits therein, or other competent authority of like nature.

4. Any document purporting to have affixed, impressed or subscribed thereon or thereto, the signature of any such Commissioner, or the signature and official seal of any such Notary Public, or the seal of the Corporation, and the signature of any such Mayor or Chief Magistrate as aforesaid, or

the seal and signature of any such Judge, Consul, Vice-Consul, Acting Consul, Pro-Consul, or Consular Agent, in testimony of any such Oath, Affidavit, Affirmation, or Declaration having been administered, sworn, or affirmed, or made by or before him, shall be admitted in evidence without proof of any such signature, or seal and signature, being the signature or the seal and signature of the person whose signature seal and signature the same purport to be, or of the official character of such person.

5. Any Affidavit, Declaration or Affirmation proving the execution of any Deed, Power of Attorney, Will, or Probate, or memorial thereof, for the purpose of registration in this Province, may be made before the Commissioner appointed under this Act, or other person authorized hereby to administer or take Oaths, Affidavits, Declarations and Affirmations.

6. No informality in the entitling or heading, or other formal requisites of any Affidavit, (*g*) Declaration or Affirmation made or taken before any Commissioner or other person under this Act, shall be any objection to its reception in evidence, if the Court or Judge before whom it is tendered think proper to receive it.

(*g*) An affidavit if made in a suit, must be correctly entitled in the suit, May v Prinsep, 11 Jur. 1032; Saloman v Stalman, 4 Beav. 243, where a misnomer of the defendant in an affidavit of service, was held a ground for discharging with costs the order obtained on the motion; but see Hawes v Bamford, 9 Sim. 653. But in Pearson v Wilcox, 10 Hare, app. xxxv; 1 W. R. 492, affidavits erroneously entitled were allowed to be taken off the file and resworn without a fresh stamp. If made on a petition under an Act of Parliament (*ex. gr.* the Trustee Act) they must be entitled in the act, Mackenzie v Mackenzie, 5 DeG. & S. 338. But affidavits filed under a petition, the heading of which has been altered, need not be resworn, Re Varteg Iron Works Wesleyan Chapel, 10 Hare, app. xxxvii; but may be made evidence in the petition under the new title by a short affidavit referring to them, *ib.* As to allowing affidavits wrongly entitled to be filed, see Fisher v Coffey, 1 Jur. N. S. 956, where the name of one of the defendants having been omitted in the title, the Court, on proof that no such suit as that described in the title existed, gave leave to file the affidavit.

The affidavit must be signed by the party making it; and when such signature was omitted in an affidavit sworn before a Justice of the Peace in America, whose signature was duly certified, the Court nevertheless refused to order it to be filed, Anderson v Stather, 9 Jur. 1085. A marks-man ought not to sign his name at full length, though his hand be guided, —— v Christopher, 11 Sim. 409.

The affidavit of a marks-man may be read though the jurat does not certify that it was read over to the deponent, who appeared to understand the same, and made his mark thereto in presence of the Master, Coy v Gardiner, Parker, M. R. at the Rolls, 7th Aug. 1852.

It has been held that if the affidavit contain erasures, such erasures must be proved to have been made before it was sworn, Gill v Gillard, 9 Hare, app. xvi; but see Vorweig v Bareiss, 5 W. R. 259, where interlineations; and Savage v Hutchinson, 24 L. J. Ch. 232, where erasures, in the recital of the contents of an exhibit were permitted. Sums must be stated in words,

Crook v Crook, 1 Jur. N. S. 654. Documents referred to in affidavits, if not set out at length, must be made exhibits, Hewetson v Todhunter, 2 Sm. & G. app. ii.

The omission of the words "make oath" in the affidavit makes it inadmissible, Philips v Prentice, 2 Hare, 542; followed, in Re Newton's will, 2 DeG. F. & J. 3; 8 W. R. 425; 2 L. T. N. S. 350.

As to deponent's description of himself in his affidavit, see Boddington v Woodley, 12 L. J. N. S. Ch. 15, where he described himself as W. S. T. S., Clerk to Messrs. A. B. & C. of &c. Solicitors, and it was held sufficient.

An affidavit containing scandalous and irrelevant matter may be ordered to be taken off the file, Goddard v Parr, 24 L. J. Ch. 783.

7. If any person shall tender in evidence any such document as aforesaid, with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall be subject to the punishment by law provided for felony.

8. Nothing herein contained shall affect or be construed in anywise to affect the provisions of the seventh Section of an Act made and passed in the nineteenth year of the Reign of Her present Majesty, intituled *An Act in further amendment of the Law.*—[See 19 Vic. c. 41, s. 7, *ante.*]

9. Nothing in this Act contained shall affect or be construed to affect or make good any Affidavit, Affirmation, Oath, or Declaration, or any other act, matter or thing heretofore made or done, but the same shall have the same and no other effect than they have or could have, had this Act not been passed.

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21 VICTORIA, CAP. III.

An Act to compel the attendance of Witnesses under Commissions from other Countries, and in further amendment of the Law of Evidence.

Section.

1. Authority for order to attend and produce papers.
2. Summons to shew cause for neglect to appear.
3. Attachment on failure to shew good cause.
4. Certain Acts of State extended to Acts of Legislature.
5. Authentication of acts done by Mayors, &c. of Cities.
6. Testimony, when admissible from a Judge's Notes.
7. Copies, without proof of official character of the Certifier, admissible in evidence.

Passed 12*th March*, 1858.

BE it enacted by the Lieutenant Governor, Legislative Council, and Assembly, as follows:—

1. Whenever any Commission or Commissions shall be issued from any Court of any other Province, State, or Kingdom, for the examination of any witness or witnesses in this Province, by any Commissioner or Commissioners named in such Commission, it shall be lawful for such Commissioner

or Commissioners to make an order for the attendance of such witness or witnesses, with such books, papers, documents, or writings of any kind as may be in the custody, power or possession of such witness or witnesses, to be mentioned in such order, at such time and place as such Commissioner or Commissioners shall appoint.

2. If after any such order shall have been served on any such witness or witnesses, and reasonable expenses tendered in the manner prescribed by Law or the practice of the Supreme Court of this Province, for the service of subpœnas in actions depending in the said Court, such witness or witnesses shall not attend in obedience to such order, and produce and give in evidence such books, papers, documents, or writings, or having attended shall without sufficient cause neglect or refuse to give evidence of the matters in question, such Commissioner or Commissioners, or any of them, or the Attorney or Agent of any of the parties to the action, proceeding or suit in which such Commission shall be issued, may apply to a Judge of the said Supreme Court, who shall forthwith, upon an affidavit of such service, refusal, or default, order such witness or witnesses to appear before him at such time and place as he shall appoint, to shew cause why an attachment should not be issued against him or them for such neglect, refusal, or default.

3. Such Judge shall have full power and authority to issue such attachment, and is hereby required to issue the same, unless good and sufficient cause be shewn to the contrary, and to make such further order in the matter with reference to such witness or witnesses and such examination, and the costs and expenses thereof, and of such neglect, refusal, or default, as he may deem proper, and may order such witness or witnesses to pay all costs and expenses incurred by such neglect, refusal, or default, and enforce such payment by attachment.

4. All Acts of State of any Foreign State or British Colony, mentioned in the fifth Section of the Act of Assembly passed in the nineteenth year of the Reign of Her present Majesty, intituled *An Act in further amendment of the Law*, (*h*) shall be held to extend to all Acts or Statutes of any Legislature, or other governing body of such Foreign State or British Colony, and to all written enactments or Laws of the same; and all the provisions of the said fifth Section of the

said Act shall be applicable to this Section as fully as if the same were hereby re-enacted.

(*h*) See *ante*, p. 93.

5. Whenever it may be necessary to authenticate any act done by any Mayor or Chief Magistrate of a City, under the Corporate Seal of such City, whether to be used as evidence in any Court, or for the purposes of Registry in any Registry of Deeds in this Province, or otherwise, the Seal of the Mayor of the said City, or Chief Magistrate, shall be a sufficient authentification of such act, unless the act done be a corporate act.

6. On the trial of any cause, the testimony of any witness given on a former trial thereof, may be given in evidence between the same parties from the Judge's notes, if the Judge on the subsequent trial shall be satisfied that the witness is dead or out of the Province, or from sickness or infirmity is unable to attend, subject to all legal exceptions: Whenever such notes shall be required on any trial, notice thereof shall be given to the Judge who took the same, and the said Judge may produce and read the same in Court, or transmit them to the presiding Judge, to be read by him on such subsequent trial.

7. A copy of any record, document, writing, or any part thereof, filed or deposited in any public office in this Province, certified by the officer having charge thereof, or his deputy, to have been carefully compared with the original, and to be a true copy, shall, without proof of his official character or hand writing, be evidence in any Court of Law, in lieu of the original, or an exemplification, or an examined copy of the same.

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3 VICTORIA, CAP. LXV.

An Act to amend the Law of Evidence in regard to the proof of Records and Letters Patent.

Section.

1. Parts of Records when exemplified, and evidence.
2. Record of Grants, when copy evidence.
3. When part thereof sufficient.
4. When copy of Plan may be annexed.
5. Nova Scotia Grants, how copies to be evidence.
6. Costs of, how allowed.

Passed 31*st March*, 1840.

WHEREAS unnecessary expense is frequently incurred in the exemplification of Judgments in the Supreme Court;—

Be it enacted, &c.—1. When parts only of Records or Rolls of Judgments in the Supreme Court may be necessary to be given in evidence, exemplifications of such parts which may be so necessary may be received in evidence in any Court in this Province, without requiring the whole of the Record or Roll to be exemplified.

2. And whereas much expense is often incurred in procuring exemplifications under the Great Seal of Grants of Land by the Crown in this Province;—A copy from the Record of any such Grant in the Office of the Secretary and Register of the Province, duly certified under the hand of such Officer, as having been examined by him with the Record, and found to be correct, or duly proved by any witness who shall have examined the same with the Record, shall be deemed and taken to be as good and sufficient evidence of such Grant or Letters Patent as an exemplification thereof under the Great Seal.

3. In the proof of title from the Crown by an exemplification under the Great Seal, or by a certified or an examined copy as is hereinbefore provided, it shall not be necessary to exemplify or copy the conditions contained in such Letters Patent, on the part of the grantees, their heirs and assigns, to be observed and performed, or any other clause in the said Letters Patent which may not be pertinent or relevant to the matter in question; and that no such exemplification or copy shall be rejected in evidence on account of the omission of such clauses, provided such omission do not prejudice the opposite party, or affect the merits in question.

4. Provided always, that when the said Letters Patent or Grant refer to any Plat or Plan as annexed thereto, no exemplification or copy of such Letters Patent or Grant shall be received in evidence, unless there be annexed thereto a true transcript or copy of such Plat or Plan, unless it be proved by the certificate of the Secretary and Register, or otherwise to the satisfaction of the Court at which the evidence may be tendered, that there is no such Plat or Plan entered with the said Grant or Letters Patent in the said Office of the Secretary and Register.

5. Grants of Land heretofore made under the Great Seal of Nova Scotia, prior to the erection and establishment of this Province, and registered in the Office of the Secretary and Register pursuant to an Act passed in the twenty sixth

year of the Reign of King George the Third, intitled *An Act for the registering of Letters Patent and Grants made under the Great Seal of the Province of Nova Scotia, of Lands now situate within the limits of this Province*, may be proved by certified or examined copies thereof, or of the material parts thereof, in like manner as hereinbefore provided in respect to Grants passed under the Great Seal of this Province.

6. The expense of any exemplification, or copy of any Roll, Record, or Letters Patent, or any part thereof, or of any Plat or Plan given in evidence by virtue of this Act, may be charged and allowed in the taxation of costs in whole or in part by the taxing officer of the Court wherein the suit may be pending, whose decision thereupon may be reviewed by the Court as in ordinary cases.

STATUTES

REPEALED BY 17 VICTORIA, CHAPTER XVIII.

SUB-CHAPTER 7, *ante*, p. 79.

NOTE.—Where any Section of these Acts is not published in full, the marginal reference only is given.

1 VICTORIA, CAP. VIII.

An Act to authorize the appointment of a Master of the Rolls to the Court of Chancery in this Province, and to provide for such Officer.

Passed 9th March, 1838.

WHEREAS it is deemed expedient that a Master of the Rolls should be appointed to the Court of Chancery;—

1. Be it therefore enacted by the Lieutenant Governor, Legislative Council, and Assembly, That it shall and may be lawful for His Excellency the Lieutenant Governor, and he is hereby fully authorized and empowered immediately after the passing of this Act to appoint, and in case of a vacancy by death, resignation or other cause, to appoint anew, a Master of the Rolls to the Court of Chancery in this Province, who shall hold his office during good behaviour: Provided always, that such person so from time to time appointed shall be a Barrister of at least ten years standing.

2. And be it enacted, That the Master of the Rolls to be appointed under the provisions of this Act, shall have the like powers and authority, in respect to the Court of Chancery in this Province, that the Master of the Rolls in England has in respect to the like Court in that country, except so far as the same shall or may be altered, enlarged, curtailed, or regulated, by any enactment of the Legislature of this Province, at this or any subsequent Session.

3. And be it enacted, That the Master of the Rolls for the time being, in all cases, except on appeals from his decision and hearings thereon before the Chancellor, shall be and be deemed the responsible adviser and judge of the said Court of Chancery, and shall sign all rules, orders and decrees made by him therein, and the signature of the Chancellor, except in the cases aforesaid, shall not be necessary to the validity of any such rules and orders in any cause, or to any

decree made in the absence of the Chancellor from Fredericton: Provided always, that the enrolment of all decrees shall be signed by the Chancellor, to whom the same shall be presented to be signed for enrolment.

4. [£800 per annum granted as a salary.]

5. [To be paid quarterly by Warrant on the Treasury.]

6. And be it enacted, That the said salary so to be allowed and paid as aforesaid, shall be in full and in lieu of all fees and emoluments whatsoever as such officer; nor shall it be lawful for such Master of the Rolls hereafter to take and receive any fee or emolument for or in respect of his said situation as Master of the Rolls, or as a Master in Chancery, other than the salary granted by this Act.

7. [Master to be ineligible to a seat in either Council or House of Assembly.]

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2 VICTORIA, CAP. XXXVII.

An Act in amendment of the Act relating to the appointment of a Master of the Rolls in the Court of Chancery.

Passed 23rd March, 1839.

1. [Right of appointment of the Master of the Rolls vested in the Queen's Majesty.]

2. [Act not to authorize the cancelling of the appointment already made; proviso for provisional appointment in case of vacancy.]

3. And whereas it is deemed necessary for the convenience of suitors and the despatch of business, that the Master of the Rolls should reside where the Court of Chancery sits;—Be it therefore enacted, That from and after the first day of October next, the usual place of residence of the Master of the Rolls shall be in the place where the Court of Chancery sits, and not elsewhere.

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2 VICTORIA, CAP. XXXV.

An Act for the improvement of the Practice in the Court of Chancery.

Passed 23rd March, 1839.

WHEREAS the Practice of the Court of Chancery is in many respects dilatory and expensive, and ill adapted to the state of the Province, and requires extensive alterations and amendments;—

1. Be it therefore enacted by the Lieutenant Governor, Legislative Council, and Assembly, That the Chancellor, by and with the advice and consent of the Master of the Rolls, shall have full power and authority from time to time to direct and declare the forms of process, and to prescribe, modify, alter and amend the practice and proceedings to be observed in all matters of which the said Court now has or hereafter may have cognizance and jurisdiction.

2. And be it enacted, That there shall be three Terms of the said Court in each year, that is to say: Hilary Term, to commence on the last Tuesday in January and to end on the Saturday then next ensuing; Trinity Term, to commence on the first Tuesday in June and to end on the Saturday then next ensuing; and Michaelmas Term, to commence on the first Tuesday in October and to end on the Saturday then next ensuing; and that causes and other matters to be heard in the said Court may be brought to hearing and heard and determined in vacation as well as in term, under such regulations as may be established in that behalf by the rules and orders of the said Court.

3. And be it enacted, That the common gaol of the County of York shall be the prison of the said Court; provided always, that in case it shall be expedient and the ends of justice be thereby answered, any prisoner of the Court may be committed to the common gaol of any County within which he may have been arrested, in case the Court shall so order and direct.

4. [Sheriffs of the several Counties to serve writs, &c.]

5. [Sheriffs, &c. to be aiding the Court.]

6. And be it enacted, That in case the plaintiff, in any suit commenced or to be commenced in the said Court, shall neglect to proceed in the same in due time, according to the practice of the said Court, the Bill may be ordered to be dismissed, and in case the defendant shall neglect to appear in due time after service of process, or shall neglect to put in his answer, or to take any other necessary step in the cause, within the time in that behalf limited by the practice of the said Court, the Bill may be ordered to be taken against him as confessed, subject nevertheless to such regulations and restrictions as may be established and provided in that behalf by the rules and orders of the said Court.

7. And be it enacted, That the several Masters in ordinary in this Court now appointed, or hereafter to be appointed, shall have power to act as examiners in the said Court; and in any case where, from the remoteness of residence of any examiner from the place of residence of the witness, or other circumstance, it may be deemed expedient, the Chancellor or Master of the Rolls shall have full power and authority, by order of the said Court, specially to appoint some other person or persons *pro hac vice*, who shall have power to administer the oath to the witnesses and take the examination in such cause: Provided always, that no examination be taken by any examiner, until such examiner shall have been first duly sworn according to the rules and regulations of the said Court to be established in that behalf.

8. And be it enacted, That the examination of witnesses in matters pending in the said Court to such extent and subject to such rules and regulations as may in that behalf be prescribed and established, may be conducted on questions suggested and proposed at the time of examination, and be attended by the parties, their Solicitors and Counsel.

9. And be it enacted, That all moneys that shall become subject to the control and distribution of this Court, shall be paid into the hands of such person or body corporate or politic as the Master of the Rolls shall from time to time direct, or be vested in such securities as the Master of the Rolls shall approve, and all interest or increase accruing thereon shall be added to the principal and distributed therewith to the person entitled to the same, subject to such rules and regulations as may be established in that behalf.

10. And be it enacted, That where in any suits pending in the said Court the cause of action shall survive, such suit shall not abate by reason of the death of one or more of the plaintiffs or defendants, but upon suggestion of such death to the Court the suit shall be allowed to proceed in favor of or against the surviving party as the case may be; and in case of the death of one or more plaintiffs or defendants in any suit where the cause of action shall not survive, it shall only abate as to the person or persons so dying and not otherwise.

11. And be it enacted, That in all cases where it shall be necessary to revive a suit against the representatives of a deceased defendant, no bill of revivor shall be necessary,

but the Court may by order direct that the same stand revived, upon the petition of the plaintiff, subject to such rules and regulations as may be made in that behalf.

12. And be it enacted, That the said Court shall have power to enforce performance of any decree, or obedience thereto, by execution against the body of the party against whom such decree is made, or against the goods and chattels, and in default thereof the lands and tenements of such; which execution so issued shall have the like effect as executions issuing out of the Supreme Court of the said Province; and every person so imprisoned under any execution issuing out of the said Court of Chancery shall be entitled to the like benefit of any statute made for the relief of insolvent debtors, as if arrested under process of the said Supreme Court.

13. And be it enacted, That in all matters relating to the practice of this Court, *not otherwise particularly provided for by Legislative enactment* or the rules and orders of this Court, the rules of practice of the High Court of Chancery in England, as now established, shall be in force, subject nevertheless to the like exceptions, limitations, restrictions and rules of construction in the application of the same as the practice of the said High Court of Chancery prevailing and in force at the time of the erection of this Province have heretofore been, and subject to be altered, modified and restricted by such rules of practice as may be hereafter from time to time introduced and established in the Court of Chancery of this Province by any Act or Acts of the General Assembly, or the orders of the said Court.

14. And be it enacted, That from and after the passing of this Act it shall and may be lawful for the Chancellor, by and with the consent of the Master of the Rolls, to prepare and make a proper table of fees for the Court of Chancery in this Province, in lieu of the table of fees at present established in that Court, which table of fees so to be made and established as aforesaid shall be in full force and effect from the time notice thereof shall be given by the Master of the Rolls in the Royal Gazette, until altered by any Legislative enactment in this Province.

52 GEORGE III, CAP. XIX.

An Act to amend an Act intituled *An Act to provide for the more easy partition of Lands in Coparcenary, Joint Tenancy, and Tenancy in Common.*

Passed 7th March, 1812.

WHEREAS by the first section of an Act made and passed in the fiftieth year of His present Majesty's Reign, intituled *An Act to provide for the more easy partition of Lands in Coparcenary, Joint Tenancy, and Tenancy in Common*, it is enacted, "that upon the petition of any one or more coparceners, joint tenants, or tenants in common, to the Supreme Court, praying a division of the lands in which they may be interested, to the proprietors in severalty, according to their respective shares and rights, it shall and may be lawful for the said Court to examine the title of the petitioners preferring such petition, and the quantity of their respective parts and purparts, and accordingly as they shall find their respective rights, parts and purparts to be, to award a writ of partition, as nearly as may be in the form for that purpose established in the register of Judicial Writs:" And whereas the said recited part of the said Act has been found to be inconvenient;—

1. Be it therefore enacted by the President, Council, and Assembly, That the same part of the said Act be and the same is hereby repealed.

2. And be it further enacted, That from and after the first day of May next, all proceedings at law for partition between coparceners, joint tenants, and tenants in common, shall commence by Writ issuing out of the Supreme Court, as nearly as may be in the form of the Writ of Partition issuing out of the Court of Chancery in England, and after such Writ of Partition returned, and affidavit being made by any credible person, of due notice given of the said Writ of Partition to the tenant or tenants to the action, and a copy thereof left with the occupier, or tenant or tenants, or if they cannot be found, to the wife, son, or daughter, (being of the age of twenty one years or upwards) of the tenant or tenants, or to the tenant in actual possession, by virtue of any estate of freehold, or for term of years, or uncertain interest, or at will, of the lands, tenements, or hereditaments, whereof the partition is demanded, (unless the said tenant in actual possession be demandant in the action,) or if no such person can be found, by publishing such copy in the Royal Gazette at

east thirty days before the day of the return of the said writ of partition, if the tenant or tenants to such writ, or any of them, or the true tenant to the messuages, lands, tenements and hereditaments as aforesaid, shall not in such case, on or before the first day of the term next after the return of such writ, cause an appearance to be entered, then in default of such appearance, the demandant having entered his declaration, the Court may proceed to examine the demandant's title and quantity of his part and purpart, and accordingly as they shall find his right, part and purpart to be, they shall for so much thereof give judgment by default, and award a writ to make partition, and such proceedings shall be had thereon in every respect as are directed in and by the said herein before recited Act, any thing herein before contained to the contrary thereof in any wise notwithstanding.

3. And be it further enacted, That if such defendants or tenants shall appear, the cause shall proceed according to due course of law, and upon judgment that partition be made between the parties to such action, a writ to make partition shall be in like manner awarded, and the same shall be executed in such manner and form as are particularly mentioned and directed in and by the same Act, any thing in the same Act contained to the contrary thereof in any wise notwithstanding.

4. And be it further enacted, That the Sheriffs respectively shall give twenty days' notice of the writ to make partition, instead of forty days as required by the first section of the said in part recited Act.

5. And be it further enacted, That the said herein before recited Act, and every clause, matter and thing therein contained, not altered or amended by this Act, shall be and remain in full force, any thing herein before contained to the contrary thereof in any wise notwithstanding.

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2 VICTORIA, CAP. XXXVI.

An Act relating to the partition of Lands, tenements and hereditaments held in coparcenary, joint tenancy, and tenancy in common.

Passed 23rd March, 1839.

WHEREAS the present mode of proceeding for the partition of lands, tenements, and hereditaments, held in coparcenary, joint tenancy, and tenancy in common, has been found inconvenient;—

1. Be it enacted by the Lieutenant Governor, Legislative Council, and Assembly, That from and after the passing of this Act, the partition of lands, tenements, and hereditaments, held in coparcenary, joint tenancy, or tenancy in common, shall be effected by the Court of Chancery according to the practice and proceedings established or to be established in that Court.

2. And be it enacted, That in case any of the parties to any proceeding in the said Court of Chancery for a partition, shall be infants under the age of twenty one years, it shall and may be lawful for the said Court to appoint a guardian or guardians *ad litem* for such infant, in like manner as such guardian may be appointed in any other suit in the said Court.

3. And be it enacted, That the decree of the said Court, whereby any part or portion of lands, tenements or hereditaments held in coparcenary, joint tenancy, or tenancy in common, shall be decreed to any coparcener, joint tenant, or tenant in common, in severalty, shall operate and be effectual to convey and transfer to such coparcener, joint tenant, or tenant in common, all and singular the right, title, interest, property, claim and demand of all and every other of the coparceners, joint tenants, or tenants in common, as such interested therein, as well infants and feme coverts as others, being parties to such proceeding, in as full and ample a manner as if the same had been conveyed and transferred by deed or conveyance, duly signed, sealed and delivered by such other coparceners, joint tenants, and tenants in common, and duly proved or acknowledged, and registered in the County where such part or portion of the lands may lie, and in the case of infants in like manner as if such infants were at the time of full age; Provided always, that such decree shall have been first duly signed and enrolled, and registered in the Office of Register of Deeds of the County where the lands may lie, according to the provisions hereinafter contained.

4. And be it enacted, That any decree of the said Court of Chancery, having been first duly signed and enrolled, may be registered in the Office of the Register of Deeds for any County in like manner and order, as any deed or conveyance, upon production to the Register of Deeds of a copy thereof, with a certificate indorsed thereupon, of the Registrar

of the Court of Chancery, under the seal of the said Court, that the same is a true copy of a decree of the said Court, and that the same has been duly signed and enrolled; and the Register of Deeds shall indorse upon such copy a certificate of such registry in like manner as is required by law, in respect of any deed or conveyance duly registered, and for his services in that behalf shall be entitled to the like fees and emoluments as are provided in the case of the registry of deeds and conveyances; and such copy of such decree, with such certificates thereon, shall be evidence in all Courts of Law and Equity in this Province, of such decree and of such registering thereof; and a copy from the County Registry of such decree, duly certified by the Register of Deeds, shall be admitted in evidence in such cases and under such rules and restrictions as a copy of a registered deed taken from such County Register would be so admitted.

2 VICTORIA, CAP. XXVIII.

An Act to authorize the Sale of Mortgaged Premises by the Court of Chancery, and directing the application of the proceeds thereof.

Passed 23rd March, 1839.

Be it enacted by the Lieutenant Governor, Legislative Council, and Assembly,—That whenever a Bill shall be filed in the Court of Chancery for the foreclosure or satisfaction of a mortgage, the Court shall have power to decree a sale of the mortgaged premises, or such part thereof as may be sufficient to discharge the amount due on the mortgage and the costs of suit.

2. [Sales and conveyances to be made by a Master under direction of the Court; conveyances may be registered in the County Register, and when given in evidence to be evidence that all the proceedings were rightly had and done.]

3. And be it enacted, That the proceeds of every sale made under the decree of the Court of Chancery as aforesaid, shall be applied to the discharge of the debts adjudged by such Court to be due, and of the costs awarded; and in case there shall be any surplus, it shall be brought into Court for the use of the Mortgagor or of the person who may be entitled thereto, subject to the order of the Court.

4. And be it enacted, That when any Bill shall be filed for the foreclosure or satisfaction of any mortgage upon which there shall be due any interest or portion only of the

principal, the Bill may be ordered to be dismissed, upon the defendants bringing into Court, at any time before the decree, the principal and interest due, with costs; and in case the same shall be brought into Court after a decree, and before a sale, further proceedings thereupon shall be stayed; but the decree shall stand as a security for such further sums as may thereafter fall due on the mortgage, and upon any subsequent default of payment thereof, may be enforced by the further order of the Court for the sale of the mortgaged premises, or of such part thereof as shall be necessary from time to time, until the amount secured by the mortgage, and the costs of the proceedings thereon, shall have been fully paid and satisfied.

5. And be it enacted, That if in any of the foregoing cases it shall appear to the Court that the mortgaged premises are so situated that the sale of the whole will be most beneficial to the parties, the decree shall in the first instance be entered for the sale of the whole premises accordingly; and in such case the proceeds of such sale shall be applied as well to the payment of the amount due and of the costs of suit, as towards the residue of the sum not due at the time of such sale; and if such residue do not bear interest, then the Court may direct the same to be paid with a deduction of the rebate of legal interest, for the time during which such residue shall not be due and payable.

6. And be it enacted, That in case of subsequent incumbrances affecting any mortgaged premises which may be sold under the decree of the said Court by virtue of this Act, the residue of the proceeds which may remain after the discharge of the first mortgage thereon shall be subject, under the order and direction of the said Court, to the claims of the holders of such subsequent incumbrances according to their due priority, whether the same be due and payable or otherwise, subject to the like rebate of interest in case of sums not payable, when the same do not bear interest, as is provided in the fifth section of this Act.

7. And be it enacted, That all sales of any mortgaged premises made under the authority of this Act, shall be made by public auction, of which not less than three months notice shall be given.

26 GEORGE III, CAP. XIV.

An Act for prevention of Frauds and Perjuries. (*a*)

(*a*) Repealed by Title 41, Cap. 162, 1 Rev. Stat. 468.

1. Parole leases and interests of Freehold shall have the effect of Estates at will only,

2. Except leases not exceeding three years.

3. Leases, &c. not to be assigned, &c. but in writing.

4. No action to be brought on special promise of Executors, &c. on promise to answer debt of another; on sale of Lands, &c. on agreement not to be performed in one year, or promise of marriage, unless in writing.

5. Declarations of trusts of Lands, not in writing, void.

6. Trusts, &c. arising, transferred or extinguished by operation of Law excepted.

7. Grants, &c. of trusts not in writing, void.

8. Sheriff to deliver Execution of Lands, &c. of which other persons are seized in trust for him against whom such Execution is sued. If cestui que trust die leaving a trust in fee simple, such trust shall be deemed assets by descent.

9. Heir not chargeable out of his own Estate by reason of an Estate or trust made assets by this Act; but such assets liable as at Common Law.

10. Estate pur auter vie, deviseable by Will; and if no devise chargeable in the hands of the heir to whom it comes by special occupancy, if no special occupant shall be assets in the hands of Executors or Administrators.

11. Judge or officer of Court signing Judgments to set down the day of the month, &c.

12. Such Judgments as against bona fide purchasers to take effect from the time of signing.

13. Writ of fieri facias, not binding but from the time of delivery to the Sheriff, such time to be endorsed on the same.

14. Contracts for sale of Goods, &c.

15. And be it further enacted, That the day of the month and year of the enrollment of the recognizances, shall be set down in the margent of the roll, where the said recognizances are enrolled, (*b*) and that no recognizance shall bind any Lands, Tenements or Hereditaments, in the hands of any purchaser bona fide, and for valuable consideration, but from the time of such enrollment, any Law, usage or course of any Court to the contrary notwithstanding. (*c*)

(*b*) The inrolment of a recognizance would seem to be the same as that of a decree, viz., engrossing the same word for word on parchment, and filing with the proper officer, together with the recognizance itself, (see *infra*;) without inrolment a recognizance is not a matter of record, but remains only as a simple bond against the parties executing the same. Glynn v Thorpe, 1 B. & Al. 153; Barthomley v Fairfax, 1 P. Wn. 334, 340; and cannot take priority as a record in the administration of assets, *ib.* A record is a memorial or remembrance on rolls of parchment, of the proceedings and acts of a Court of Justice, which hath power to hold plea *secundum legem et consuetudinem anglæ.* 1 Inst. 260 (*a*); 4 Inst. 79; 2 Com. Dig. Chan. 213.

If a recognizance be not properly vacated by the Court, and the order for such vacation duly inroled, the parties thereto, under certain circumstances, may at any distant period be held liable for subsequently discovered errors, &c. 1 Tur. Chan. 471.

By analogy to the proceedings in the inrolment of decrees or orders, (see *infra*,) it would seem necessary that the proceedings of the Court under which the recognizance is taken, should be formally drawn up and signed by

the Judge who made the order, and these proceedings copied on parchment, signed by the Clerk, and filed in his office.

By Rule of Court 1674, (still in force in this Province,) and now incorporated in the consolidated orders in England, it is ordered "that no recognizance acknowledged in this Court, of what nature or kind soever, shall be enrolled therein after six months from the acknowledgment thereof, except under special circumstances, and by an order made by the Court upon motion for the enrollment thereof after that time," Morg. 592; and by another Rule of the last mentioned Order, the Clerk of the inrolments shall attend with the recognizance to be vacated; *ib.*

In making an order for inrolment after the expiration of six months the Court will always take care not to hurt an intervening purchaser, 1 P. Wn. 334, *ante;* Rothergill v Hendrick, 2 Vern. 234.

Upon a recognizance given by a *Receiver*, the practice was that the receiver and his sureties must personally attend and enter into the recognizance before the Master, and the sureties must justify by affidavit of their sufficiency; in the country the recognizance, &c. may be taken before a Master extraordinary, the recognizance is then carried by the Master's clerk to the Enrollment Office in Chancery, enrolled there, and a receipt taken, 1 Tur. Chan. 456.

A recognizance upon a *ne exeat regno*, is prepared upon instructions from the defendant's solicitor, by the clerk to the senior Master, before whom the recognizance is to be acknowledged, and by whom it is inrolled, 1 Tur. Cha. 990.

A recognizance by guardian to infant's person and property would seem to be subject to the same rules.

On the hearing of the petition an order will be made confirming the report. and appointing the person proposed guardian on his entering into a recognizance duly to account for the infant's property and fortune. The order must be drawn up, passed and entered at the Register's office, and a copy left with the Master, whose clerk will prepare the recognizance and see that the same is duly entered, 1 Tur. Cha. 676.

Enrolment of a deed under 27 Hen. 8, c. 16, is by engrossing on parchment and depositing them with the proper officer in one of the Supreme Courts, or by the Clerk of the Peace with the *Custos Rotulorum* of the County.

Enrolment of decrees only having been abolished (*vide ante*, p. 60,) the following directions may be found useful for the purposes of ascertaining what may be still necessary in reference to preliminary proceedings in matters of decree as well as in *orders*, especially as it would seem necessary still for the Clerk before he makes entry of his substituted abstract in *the book*, to make up the *decree and docquet* in the same way in all particulars as before the passing of 17 Vic. c. 18, (*ante* p. 34); which *decree or docquet*, as it is indifferently termed in some of the books of practice, must be signed by the Judge who pronounced the decree. In substituting this book for enrolment the Legislature has imposed a new and important responsibility upon the Clerk. The enrolment was merely a clerical duty, viz. engrossing what had received the sanction of the Judge by his signature, but the record to be made in this book is to be made by the *unaided discretion and judgment* of the Clerk himself, who is to enter an *abstract of the pleadings* and a *reference to the evidence*, &c. The Act does not direct that *this book* or a certified copy thereof shall be evidence of the decree, if required to be proved in any other Court, but as it is provided to be *instead of enrolment*, it would almost follow as a consequence that it would be subject to the same rules as the enrolment itself formerly was. In making up the docquet or decree the Clerk is to be furnished with a brief of the pleadings, but in making up this abstract he seems to have been made by the Legislature the sole judge of what *the book* should contain, with the exception of the decree itself, which must be entered in full.

"A decree is the final order of the Court determining the right of the matters in question upon a full hearing, agreeable to equity, and ordering the parties accordingly. It is pronounced in open Court by the Lord Chancellor, Keeper, First Commissioner, or Master of the Rolls; and it is minuted down by the Register then sitting in Court, who afterwards usually reads the same to the Court, and if any mistake do thereupon appear, the same is forthwith rectified. Afterwards, the Register being applied to, and a brief of the pleadings being left with him at the office, he thereupon draws up the decree in form, according to the pleadings and minutes in the cause, and commonly issues a note to the adverse party that he may take a copy, if he thinks fit, and attend him before the same is passed." 2 Har. Chan. 161.

"The decree being passed, is to be left with the entering Register to be entered within —— months, or else you will be obliged to obtain an order that the same may be entered *nunc pro tunc;* after which it may be signed and inrolled; and until it be signed and inrolled it has only the power of an interlocutory order; and is not final, and may be altered on a rehearing, or sometimes upon motion or petition." 2 Har. Chan. 162.

The Court pronounces the decree, *minutes* of which are taken down in writing by the Register, which the Rules and Orders direct to be read openly in Court. 1 Tur. Chan. 309.

Every decree before it can be enrolled must be signed by the Lord Chancellor, although made by the Master of the Rolls, Vice Chancellor, &c.— 1 Tur. Chan. 734.

Enrollment is the engrossing the decree on parchment, and leaving it with the proper officer. 2 Mad. Chan. 464.

Any person (although not a party to the suit) if interested in, and a party to an order, may enrol that order. The party desirous of enrolling a decree or order, leaves the same, or an office copy duly passed and entered, with his Clerk in Court, who will inform him what *orders, reports and papers* will be required. From these and the pleadings in the cause, the Clerk in Court prepares the docquet of the enrolment, which is examined by the senior Clerk, and signed by him. The docquet is then left with the Secretary of Decrees for signature. If the *decree or order* was made by the Master of the Rolls, the Secretary procures his signature to the docquet, after which he procures the signature of the Lord Chancellor. If the *decree or order* was made by the Vice Chancellor, or by the Lord Chancellor, it is only signed by the Lord Chancellor. The docquet when signed is returned to the Clerk in Court and is afterwards copied on rolls of parchment. These rolls and the docquet are preserved among the records of the Court. 2 Smith, Ch. 2nd ed. 3.

As soon as the decree is signed by the M. R. (which he always does if he pronounced the decree) and also by the Lord Chancellor, (which must be done in all cases) you carry the decree to the *Clerk of the Chapel of the Rolls*, who, according to the length of the decree, gives you as many parchment rolls as will inrol the decree; the Clerk of the Rolls usually writing upon the last sheet of the decree, which is called the docquet, the day and year and his name thereto, as a memorandum that he has delivered such rolls, on which rolls the plaintiff's clerk in Court, or his clerk or agent, engrosses the decree in a strong Secretary hand, (which before the late Act of Parliament were always enrolled in a good Chancery hand,) which must be word for word as in the docquet or decree; but there is no occasion to write in the enrollment the M. R. or the Lord Chancellor's names, but only to conclude with the end of the decree; and when the enrollment is carefully examined with the docquet of the decree, the plaintiff's clerk in Court may carry both over to the Clerk of the Rolls Chapel, who will receive them, and give you a receipt for them if you desire it; in whose custody both the docquet and inrollment are to remain for any one at any time to inspect and take a copy thereof if he requires it, upon paying the Clerk of the Chapel for the seal thereof, and also for such copy." 2 Har. Chan. 173.

(c) By the repeal of this section recognizances (as before the passing of this Act) would bind the lands, &c., from the date of the recognizance, see however Tit. 3, Cap. 6, 1 Rev. Stat. 24, s. 3. where it is enacted that— "The lands of the debtor shall be bound in cases of specialties from the date thereof, which date shall be set forth in the proceedings and judgment, and in case of simple contract debt from the time of signing the judgment." By the repeal of this Act the titles of purchasers from *cognizors* after the date of the recognizance, are rendered more liable to be impugned by *cognizees*, as they lose the protection of the Court when enrolment is delayed for six months.

The *docket* is a draft copy of the decree, from which the enrolment is taken, and must be carefully compared with the several pleadings and records which it recites, by the same Clerk who prepares it; and who certifies its correctness by his signature on the last sheet, previous to its being presented to the Lord Chancellor. Lubé, Analy. Eq. Pl. 166.

The enrollment is that which gives the decree its full efficiency; previous to which it has only the force and effect of an interlocutory order; wherefore the decree is not pleadable until after it is enrolled. *Ib.* 167, citing 3 Atk. 809.

As to enrolment of deeds under 27 Hen. 8, c. 16, see Doe dem Hannington v M'Fadden, Bert. R. 153, where the Court gave very full and elaborate judgment, and held that that Act, as well as the Statute of Uses, was in force in this Province.

Although some of the proceedings upon forfeited recognizances, now that the Court of Chancery has been abolished, and its jurisdiction and powers transferred to the Supreme Court, must necessarily become obsolete, yet the following extracts in reference to such proceedings may not be found unacceptable to the profession.

All debts due the King bind from the time the same are contracted; for the debts that were of record always bound the lands and tenements, and the debts not of record by 33 Henry 8, c. 39, bind as a Statute Staple; for all lands being held mediately or immediately from the King, when therefore any debt was recorded of any person, it laid the estate as liable to such debt as if it had been a reservation on the first patent; and therefore as the King could seize for the non-payment of the reserved rent, so he could seize the land for any debt with which the land was charged. Ch. Baron Gilbert's Excheq. 88.

When an obligation is acknowledged in a Court of Record, such recognizance is the same as a judgment. The *conusor* is personally present, and the Court is supposed to know him as much as a defendant against whom they give judgment; and hence it is that the *levari* issues, and all the other prerogative process, and that debt cannot be discharged till there be a receipt upon record; but when the King's ministerial officer takes an obligation to the King, such obligation is not of record, and when the officer delivers such obligation into Court the time of delivery is recorded; so that if that obligation be just, and the conusor has nothing to say against it, no body can controvert the time of its lien, because the delivery is of record, and therefore it ought to bind from that time; but the obligation is no more than a *Warrant of Attorney* for the ministerial or other person to deliver it of record; for being an act in *Pais*, and not of record, the conusor may come in upon the return of the *scire facias* and traverse the obligation, Gilb. Ex. 97; bonds in *pais* are now by 33 H. 8, c. 39, made statute staple, and therefore the lien is from the time of the acknowledgment, and a *levari* may issue at any time within a year after the day that the money in the obligation is payable; but if they exceed the year then there must be a *scire facias* as in the case of a common Statute Staple, *ib.* 102.

The King's Chancellor for the time being, causes the Clerk of the Chancery, to whom it doth appertain, to inroll or cause to be inrolled, distinctly and plenarily, in the Patent Rolls in the Chancery, all and singular Charters, &c. Gilb. Ex. 103; the Master of the Rolls, yearly from time to time transmits Estreats of Parchments, prestwise, in a conform measure, and of one assize, written upon one side only, all and singular the said Charters, &c., out of the said Patent Rolls, and the same *Estreats* the said Chancellor, or Master, or Keeper of the Rolls, for the time being, shall deliver in their own persons, yearly to the Barons of the Exchequer in the Terms of Mich. and Easter, for execution and process to be made and had thereupon for the King, *ib.* 104; after the *Estreats of the Chancery*, by the hands of the Chancellor, &c., the Chief remembrancer of the Exchequer shall take the same by delivery of the Barons, and shall number and make a roll, &c., *ib.* 105; this original roll out of Chancery was the foundation of the King's Court of Revenues of the Exchequer, and upon this roll process was made out for the getting in all manner of debt and duties contained in the same, *ib.* 106.

There are no recognizances for the performance of decrees of the Court of Chancery estreated into the exchequer, because they are taken to the Master of the Rolls and one of the Masters of the Court, and not to the Crown; and therefore are sued there and nothing is estreated; and the Statute Merchant and Statute Staple are estreated into Chancery by the Statute, and from thence execution is to go, Gilb. Ex. 128.

Before the time of Henry 8 there were very few bonds given to the Crown, but *recognizances* might be taken to the Crown, for they were matters of record, and the King could not take any debt, but by matter of record, but it seems to have been the method before the time of Hen. 8, whenever they gave bond to the Crown, to give a Warrant of Attorney to confess a judgment; and then, though the King could not take by the bond, which was no matter of record, yet he could take by the judgment confessed unto him; but

by 33 Hen. 8, c. 39, a bond given to the King was made in the nature of a Statute Staple, &c. If it be doubtful whether the bond or recognizance be forfeited, then a *scire facias* shall issue, so if after a year and a day there be any prosecution upon such bonds it seems a *scire facias* shall issue; Gilb. Ex. 165. See as to Estreats from King's Bench, Justices in Eyre, Common Pleas, and Clerk of the Session into the Exchequer, *ib.* 129; Man. Exch. Pra. 316; and Reg. v Appleby, Berton's Rep. 399, where the question of an estreated recognizance is very fully discussed, the Court dividing in opinion upon it.

33 Hen. 8, c. 39, is not in force in Ireland. Gilbert Exch. 98; Mann. Ex. Pr. 23.

The 79th sec. of 33 Hen. 8, c. 39, provides as follows:—"That if any person or persons of whom any such debt or duty is or at any time hereafter shall be demanded or required, allege, plead, declare, or shew, in any of the said Courts, good, perfect and sufficient cause and matter in law, reason, or good conscience, in bar or discharge of the said debt or duty, or why such person or persons ought not to be charged or chargeable to or with the same, and the same cause or matter be alleged, pleaded, declared, or shewed sufficiently proved in such one of the said Courts as he or they shall be impleaded, sued, vexed or troubled for the same; that then the said Courts, and every of them, shall have full power and authority to accept, adjudge and allow the same proof, and wholly and clearly to acquit and discharge all and every person and persons that shall be so impleaded, sued, vexed or troubled for the same; any thing in this present Act before mentioned to the contrary notwithstanding."

In *ex parte* Usher, 1 Ball & Beat. 197, the Lord Chancellor said that Recognizance by a guardian in the matter of a minor, was not a debt due to the Crown. Also when the debt to the Crown is not of a public nature, the Crown process should not issue, as the form of the security does not alter the nature of the debt. In the above case a petition had been presented on behalf of the sureties, praying that mortgaged premises belonging to the principal, a bankrupt, might be sold, and the surplus be applied to satisfying a debt due by the bankrupt to the minor's estate, and secured by the recognizance of the minor.

Recognizance by a guardian in the matter of a minor, not being a real debt due to the Crown, but a mere form of security, the person secured by it can derive no preference in bankruptcy over other creditors. *In Re* Dalton, 2 Molloy, 442.

ADDENDA ET CORRIGENDA.

The following Rule was omitted, page 32.

HILARY TERM, 25 VICTORIA, A. D. 1862.

It is Ordered, That from and after the first day of Easter Term next, the article called or known as *Patent Parchment*, be not used for the Writs, Bills, Answers or Pleadings of this Court in Equity.

Amendment of Bills, ante p. 44.

By the practice of the Court of Chancery in England, as adopted in this Province, *ante* p. 34, a suit in Chancery was commenced by filing a bill engrossed on parchment, upon which a subpœna issued to the defendant to appear and answer within a time specified therein.

By 15 and 16 Vic. c. 86, s. 2 and 3, engrossing on parchment was discontinued, and printed bills were substituted, a copy of which latter, with an indorsement thereon, commanding appearance &c. within a certain time, was to be served upon the defendant, and the subpœna to appear was abolished.

By 17 Vic. c. 8, *ante* p. 38, all suits in Equity, except injunction cases before hearing, must now be commenced by summons, and the bill of complaint is not to be filed until after forty days if no appearance is put in.

There would seem to be some difficulty under this Act in applying the old practice as to amending bills before appearance, by adding plaintiffs without notice, and proceeding to take the amended bill *pro confesso*. It does not clearly appear from the books of practice whether the amendments allowed before appearance, were made after the time for appearance had expired or not; but the whole tenor of the authorities would seem to require that notice of all amendments, in some way or other, should be given to the defendant. Where the defendant is within the jurisdiction of the English Courts, no decree *pro confesso* for want of appearance can be had against him without his being fully aware of the whole proceedings; but by 26 Vic. c. 16, s. 7, *ante* 86, in mortgage cases a decree *pro confesso* can be had for want of appearance without notice to party. The question here arises whether, in such cases, a plaintiff can amend his *bill* by adding co-plaintiffs when defendant has not appeared, and proceed to decree *pro confesso*, when the *summons* served on the party remains unamended and shews a different suit? Should not the summons be amended and re-served, or notice of the motion to amend given to defendant or a new summons issued? If not, a defendant who might be advised not to appear to the summons served, would be concluded by a decree obtained in a suit of which he never had notice.

The case in Equity, Cases Abr. 29, which is cited in some of the books of practice as authority for adding a plaintiff before appearance, is *verbatim* as follows:—"A bill may be amended where there are not proper parties made defendants to the suit. 3 Chan. Rep. 92." The marginal note is—"If there be any oversight or mistake in the bill which requires amendment before the defendant appears, it may be amended upon motion, without paying costs; but if it be amended after appearance, costs must be paid."

In Hichens v Congreve, 1 Sim. 500, where two of the defendants had put in their answers, the bill was amended by adding plaintiffs; on motion to have the amended bill taken off file and the amendments struck out, it was said *arguendo* that the defendants might be prejudiced by the adding of a plaintiff after they had answered the bill, inasmuch as they might have been able to defeat the original plaintiff, and under that impression might have made admissions which they would not have made if the additional parties had been plaintiffs originally, or might have qualified those admissions, &c. But the Vice-Chancellor said that no injury could fall upon the defendants, for after the bill is amended, a defendant has an opportunity of adding explanatory circumstances in his answer to the amendments.

Now under 17 Vic. c. 18, *ante* 38, which makes a summons the commencement of a suit, if where a party has allowed the time to pass for his appearance to a *summons* issued by one party, the plaintiff can amend his *bill* by adding a new plaintiff without giving notice to the defendant, and have it taken *pro confesso*

by the amended title; the defendant would surely come within the reasoning and ruling of the above case, inasmuch as the summons to the defendant would shew one title and the decree another, and to which latter, if notice had been given, the defendant might have appeared.

Under an order made at the hearing, the cause should stand over with liberty for the plaintiff to amend his bill by adding parties as he should be advised, on shewing why he was unable to bring all proper parties before the Court; the plaintiff is not entitled to add parties or co-plaintiffs, and introduce new statements and charges in the bill relating to such plaintiffs. Milligan v Mitchell, 1 M. & C. 433.

In Sopers v Myers, 3 L. J. Ch. 49, an objection having been taken at the hearing for want of parties, the cause stood over in order that parties might be added, and the usual order for that purpose had been obtained. The plaintiff amended by making E. Wright a co-plaintiff. The cause having come on again the question arose, whether under the usual order giving leave to amend by adding parties, a new plaintiff could be introduced into the suit.

The *Vice Chancellor* "was of opinion, that by the amendment the record had been rendered altogether irregular, and he apprehended that the Court would be obliged to dismiss the bill." The cause, however, was allowed to stand over, in order to search for authorities in support of such an amendment. When the cause came on again, it was admitted that no authorities had been found.

Vice-Chancellor—"If special leave to add a new plaintiff had been applied for, I could not have granted it. How can a stranger to all former proceedings come in to pray for relief in so late a stage of the suit? The dismissal of this bill will not preclude a new suit; but no decree can be made upon the first record."

Nothing having been done after the amendment, and the suit being in all other respects the same, it was suggested that the Court would now permit the amendment to be made properly.

Vice-Chancellor—"Leave may be granted to amend by making E. Wright *a defendant*. As nothing has been done in the suit since the record was altered, there will be no irregularity on the face of the proceedings."

When, as in this Court, the *summons* is the commencement of the suit, can an amendment of the bill by adding plaintiffs (at least) without notice to the defendant, be made without altering the record of the summons? Or can the Clerk, under an order to amend the bill by adding a co-plaintiff, amend also the summons?

From Hand's Ch. Sol. 9, the following order is taken:—"Upon motion this day made into this Court by Mr. ——, of Counsel for the plaintiffs, it was alleged that the plaintiffs having exhibited their bill in this Court against the defendants, are advised to amend the same; and in regard none of the defendants have appeared to the plaintiffs' bill, *it was therefore prayed* that the plaintiffs may be at liberty to amend their bill as they shall be advised, without costs, which is ordered accordingly."

An amended bill is considered as an original bill, and new subpœnas are not necessary, unless where there is a new engrossment of the bill; for where there is not a new engrossment, *the plaintiff undertakes to amend the defendant's copy, and that gives him notice.* 1 Mad. Ch. 369.

An original and an amended bill are as one, and the records are always fixed together; but when the amendments are so large as they cannot be added, then there is a new engrossment, and the parties ought to be mentioned over again and to be served with notice of it. Vernon v Vaudrey, 2 Atk. 119.

An amendment was allowed by striking out the names of several plaintiffs between the hearing of the cause and giving judgment. Palk v Ld. Clinton, 12 Ves. 48.

The amendment of a bill puts an end to all process of contempt which may have been sued out against the party; because an original and amended bill are one and the same record; and therefore when the bill is perfected by amendment, the proceedings must be commenced *de novo.* This rule is carried to the extent of where even the amendments are only the addition of necessary parties. Lube's Anal. Eq. Pl. 83, (citing 2 Cox 411). But an an amendment by merely adding new parties will be permitted at any time, even at the hearing of the cause. *Ib.* 85, (citing 1 Atk. 51, 289; 2 Atk. 370.)

If the plaintiff conceives from any matter offered by the defendant's *plea or answer*, that his bill is not properly adapted to his case, he may obtain leave to amend the bill. 1 Tur. Ch. 161. If the application to amend the bill be before appearance, the plaintiff pays no costs. *Ib.* (citing 1 Eq. Ca. Abr. 29, *supra.*)

A bill may be amended before or after the defendant has appeared. 2 Mad. Ch. 246, (citing also Eq. Ca. Abr. *supra.*)

Two folios of amendment introduced continuously in any one part of the record, renders a new engrossment necessary. If the amendments are not of sufficient length to require a new engrossment, the plaintiff's Solicitor leaves the draft of the bill with his Clerk in Court, (now the Clerk in Equity,) as altered and signed by Counsel, together with the order to amend, and the Clerk in Court amends his record of the bill. 1 Smith Ch. 297.

If there be not much new matter to be introduced, it may be by interpolation; if much, it must be done on another engrossment to be annexed to the bill, in order to preserve the record from being defaced. Willis v Evans, 2 Ball & Beat. 225.

If any irregularity arise in any alteration of the bill by way of amendment, it may be taken advantage of by demurrer or plea. 1 Tur. Ch. 165.

See sec. 18 of 17 Vic. c. 18, *ante* p. 49.—This section does not enable the Court of Chancery to determine a mere question of law, unnecessary to be determined previously to the determination of the question of Equity. Trustees of Birkenhead Dock v Laird et al., 23 L. J. Ch. 457, 18 Jur. 883; The Shewsbury and Birm. Ry. Co. v Stour Valley Ry. Co., 2 De G. M. & G. 866. See *note* to sec. 28, p. 56, *ante.*

Where some of the parties were infants, and therefore unable to bind themselves, it was held that the Court had no power, even by consent, to decide a purely legal question, so as to bind the infants, Webb v Byng, 2 Jur. N. S. 1242; see also Dufour v Sigel, 4 De G. M. & G. 520, 22 L. J. Ch. 678, 681.

See *note* (*n*) p. 57.—The words "change of interest" have been held applicable to the case of a necessary party coming into existence during the pending of the suit, Fullerton v Martin, 1 Drew. 238; 1 W. R. 49; Phippen v Brown, 1 K. & J. 1 Jur. N. S. 698; Pickford v Brown, 1 K. & J. 643; and in Jebb v Tugwell, 20 Beav. 461; 24 L. J. Ch. 670; 25 L. T. 171, the principle was extended by making a supplemental order, binding the interest of an infant, born just before the decree, but through inadvertence, not made a party to the suit.

Note (*a*) p. 90.—Infants are not capable of being made parties to a special case under this Act. The English Statute contains special enactments which seem to have been purposely left out of this Act.

As to sec. 7 of 21 V. c. 3, p. 106, *ante*, see Burgoyne v Moffatt, 5 Allen.

RULES

ON COMMON LAW SIDE OF THE

SUPREME COURT,

FROM

MICHAELMAS TERM, 11 Victoria, 1847, to MICHAELMAS TERM, 1865,

BOTH INCLUSIVE.

MADE SINCE THE PUBLICATION OF ALLEN'S RULES.

MICHAELMAS TERM, 11th VICTORIA, A. D. 1847.

Admission of Barristers, Attorneys and Students.

Whereas certain Rules and Regulations, touching the Examination of persons as Students at Law, and Attorneys, and the admission of Attorneys and Barristers of the Supreme Court, were duly made by the Barristers' Society in Hilary Term last, at a Meeting of the said Society holden at Fredericton, pursuant to the Act of Assembly, 9th Vic. cap. 49, which said Rules and Regulations have been sanctioned by the Judges of this Court, in conformity to the said Act, and are as follows:—

"At a Meeting of the Barristers' Society of New Brunswick, holden in the Supreme Court Room, at Fredericton, this eighth day of February, A. D. 1847, the following Rules were adopted:—

Rules touching the Examination of persons as Students at Law and Attorneys, and regulating the admission of Attorneys and Barristers of the Supreme Court.

"I. That before any person is presented to the Barristers' Society for the purpose of being examined, in order to his being entered as a Student in the Office of any Barrister of this Society, he shall present a Petition to the Benchers, setting forth his age, place of birth, residence, place of education, the branches in which he is prepared to undergo an examination, and the name of the Barrister with whom

he purposes studying; which Petition shall be subscribed by the applicant, and certified by such Barrister, as to his character and habits, and that he verily believes him to be a proper person to be admitted as a Student at Law; and upon such applicant being approved of by the Benchers, he shall be fully and strictly examined in the English and Latin Languages, Mathematics, Geography and History, by the said Benchers, or any three of them, at Fredericton.

"II. That upon the applicant passing such examination, and the Benchers being satisfied as to his moral character, good habits, and fitness to enter upon the study of the Law, he shall receive a Certificate to that effect.

"III. That every Student making application for admission as an Attorney, shall give a Term's notice thereof to this Society, (*a*) and shall undergo a full and strict examination before the Benchers, or any three of them, in the Elementary principles of the Law of Real and Personal Property, Forms of Action, Pleading, Evidence, and Practice.

(*a*) The Rule of Mich. T. 1837, (Allen's Rules, 31,) is considered to be still in force, and the form of petition there prescribed is required to be presented by Students applying for admission.

"IV. That upon the Student passing such examination, and the Benchers being fully satisfied as to his moral character, habits and conduct during the term of his study, (*b*) he shall be recommended for admission as an Attorney; provided always, that in case any Student shall not pass his examination before three of the Benchers as aforesaid, such Benchers shall report the fact to the whole body of Benchers, and he may be heard before them against the refusal of his Certificate.

(*b*) See Act 26 Vic. c. 23, reducing the term of study; also Rule of Hilary T. 1858, as to Graduates.

"V. That every Attorney applying to be called to the Bar, (*c*) shall give to this Society a Term's notice of such his intention; and if, during the period since his admission as an Attorney, his practice and conduct have been professional and honorable, and no objections are made to his moral character and habits, he shall be recommended accordingly; but if objections be made, an enquiry therein shall be instituted by the Benchers, or a Committee of them; and upon such inquiry, the said Benchers, or a Committee as aforesaid, shall either grant or withhold a Certificate of recommen-

dation for such Attorney's admission as a Barrister, as to them may appear just and right in the premises."

(c) See Rule of Hilary T. 1858, as to Graduates; and Rule of Easter T. 1856, as to the admission of Barristers from other Colonies.

I. It is Ordered, That the Examination of persons desirous of becoming Students, or being admitted as Attorneys of this Court, shall be conducted by the Benchers of the Barristers' Society, as provided for by the said Rules and Regulations; and that no person be entered as a Student, or sworn and enrolled as an Attorney of this Court, or admitted as a Barrister, unless he produce a certificate to be granted pursuant to the said Rules: Provided that this order do not extend to Barristers from other parts of Her Majesty's Dominions, applying to be admitted Barristers here; and provided also, that nothing herein contained shall extend or be construed to impair or interfere with the general superintending power and authority of this Court over all or any of the matters aforesaid.

II. It is further Ordered, That such of the Rules and Orders of this Court as are inconsistent with the said Rules and Regulations of the Barristers' Society, or so far as they regulate matters therein provided for, (excepting as aforesaid,) be suspended until the further order of the Court in the premises.

Nisi Prius Sittings in the County of York.

III. It is Ordered, That after the present year there shall be Sittings of Nisi Prius for the County of York after the Hilary and Trinity Terms of this Court only, that is to say: Sittings after Hilary Term on the third Tuesday in February in each and every year (*d*); and Sittings after Trinity Term on the fourth Tuesday in June in each and every year; the said respective Sittings to continue for so long a time, as in the opinion of the Judge holding the same, may be necessary for the dispatch of the business depending. (*e*) And it is further Ordered, That all the parts of the General Rule of Michaelmas Term in the sixth year of the Reign of King William the Fourth, which relate to Nisi Prius Sittings for the County of York, shall remain in force, excepting the appointment of such Sittings after the Michaelmas Term of this Court. (*f*)

(*d*) By the Act 22 Vic., c. 2, the Sittings in York are to be held on the second Tuesday in January instead of the third Tuesday in February.

(*e*) See Rules of Easter T. 1855, and Hilary T. 1860, *post*.

(*f*) See Allen's Rules, 23.

Papers annexed to Affidavits.

IV. It is Ordered, That from and after the last day of Hilary Term next, the Judge, Commissioner, or Officer taking any affidavit to which any other paper or papers may be annexed, do at the time of taking such affidavit, mark every such annexed paper with his name, or the initial letters of his name. (*g*)

(*g*) This Rule does not apply to affidavits of the service of writs. See Rule, Easter T. 1848, *infra*.

HILARY TERM, 11th VICTORIA, A. D. 1848.

Affidavit of illiterate person.

I. It is Ordered, That from and after the first day of Easter Term next, where any affidavit is taken by any Commissioner of this Court, made by any person unable to write or appearing to be illiterate, the Commissioner taking such affidavit shall himself read over, and if necessary, explain the affidavit to the party making the same; and shall certify or state in the jurat, that the affidavit was read by him to the deponent, (*h*) who seemed perfectly to understand the same, and also that the said deponent wrote his or her signature, or made his or her mark, in the presence of the Commissioner taking the said affidavit.

(*h*) See *ex parte* Irvine, 2 Allen, 472.

Where more than one deponent.

II. It is further Ordered, That after the time aforesaid, where there are two or more deponents in the same affidavit, the names of the deponents who are sworn thereto shall be specified in the jurat.

EASTER TERM, 11th VICTORIA, A. D. 1848.

Clerk's Office.

I. It is Ordered, That the following Regulations be observed in the Office of the Clerk of the Pleas:—

Entry of Cause.

1st. No Judgment, interlocutory or final, to be signed in any cause until it is ascertained, upon search, that the cause has been duly entered (*i*); provided, that where there is an interlocutory judgment, the search need not be repeated when final judgment is signed; and provided also, that entries may be made as heretofore accustomed in cases of Warrants of Attorney to confess judgment.

(*i*) By Rule of Trinity Term, 1840, (Allen's Rules, 41,) the process and affidavit of service must be on file before interlocutory judgment can be signed. If the plaintiff does not enter his cause in due time, according to the Rule of Hilary Term, 1837, he must shew a good reason for the delay, or he will not be allowed to enter it afterwards. Thus, where the defendant appeared within the time limited for entering the cause, but the plaintiff did not enter it in consequence of a proposal by the defendant to settle, as it was alleged, the Court refused, after a lapse of two terms, to allow the cause to be entered. Wetmore v Briggs, 4 Allen, 590. And where the writ was returnable in Trinity Term 1857, and the cause defended and tried, and a verdict for the plaintiff affirmed in Easter Term 1860, an application made in the following term for leave to enter the cause and sign judgment was refused, though the Attorney swore that the omission arose from an oversight, and not from any intention of violating the Rule of Court. M'Auley v Geddes, 4 Allen 591.

Warrant of Attorney.

2nd. No Judgment to be signed on a Warrant of Attorney after one year from its date without the order of the Court, or of a Judge. (*k*)

(*k*) See Allen's Rules, 30. Where a Judge's order to sign judgment on a Warrant of Attorney had been granted on an affidavit which was not strictly sufficient, the Court refused to set aside the judgment, it not appearing that any injustice had been done, and the defendant's affidavit on the motion supplying the alleged defect. Smith v LeBergue, 1 Allen, 266.

Confession of Judgment.

3rd. No Judgment to be signed upon any confession, cognovit, or retraxit, after one year from the date thereof, or from the Term whereof the same is granted, without the order of the Court, or of a Judge.

Recognizance Roll, &c.

4th. No Recognizance Roll or a Recognizance of Bail to be received or filed until it is ascertained, upon search, that the Recognizance or Bail-piece is on file.

Judgment Rolls.

5th. All Judgment Rolls to be endorsed with the title of the Term wherein final judgment is awarded; and when judgment is entered in vacation, then to be endorsed of the Term next preceding, and the Rolls are to be numbered consecutively as they are brought in and filed of such Term, and to be referred to in pleading as the Rolls of such Term.

Affidavits.

II. It is further Ordered, That the General Rule of Michaelmas Term last, in regard to marking papers annexed to any affidavit, shall not extend to affidavits of service of writs returned by the Sheriff, or other officer, to whom the writs are respectively directed.

MICHAELMAS TERM, 12th VICTORIA, A. D. 1848.

Notice of Countermand.

It is Ordered, That no Notice of countermand shall be deemed sufficient to save costs, if any there be, for not proceeding to the execution of a Writ of Inquiry of damages pursuant to notice, unless it be given at least ten days before the time appointed for such Inquiry. (*l*)

(*l*) See Allen's Rules, 16.

EASTER TERM, 12th VICTORIA, A. D. 1849.

Taxation of Costs.

It is Ordered, That the following Regulations be observed in the Office of the Clerk of the Pleas:—

1st. Every Affidavit used before the Clerk, on the taxation of costs, to be retained and filed on a file to be kept for this purpose.

2nd. The names of witnesses, the days attendance and mileage of each witness, to be specified in every Bill of Costs brought for taxation. (*m*)

(*m*) Before this Rule the names of the witnesses should properly have been stated in the bill of costs, or in the affidavit of the attendance of witnesses; but where they were not stated in the bill of costs, and no copy of the affidavit of their attendance was served on the defendant's Attorney, and he attended the taxation without making any objection on that ground, it was held that he had waived his right to apply for a review of the taxation, though the affidavit on which the witnesses' expenses were allowed was afterwards contradicted in several particulars. Chace v Fawcett, 1 Allen, 566. And where a party has been served with a regular copy of a bill of costs and affidavit of attendance of witnesses, and has attended the taxation without objection, he cannot afterwards apply for a review on the discovery of facts which he might have known at the time of taxation, unless, perhaps, a fraud has been practised on him. Flaglor v Richards, 1 Allen, 599.

It is Ordered, That where parties who are not Attorneys of this Court, prosecute or defend any action in person, no papers, writs or records be received or filed in the Clerk's Office, or entries made, without the fees being paid thereon at the time of such filing or entering.

TRINITY TERM, 12th VICTORIA, A. D. 1849.

Judgment quasi nonsuit.

It is Ordered, That in the Notice of motion for judgment, as in case of a nonsuit, the copy of Affidavit, as required by Rule 3, Hilary Term, 6th William 4, shall be deemed sufficient if served on Tuesday the fourteenth day preceding the Term, so as to make the notice of motion in this case

conform to the other notices of motion upon the Motion Paper. (*n*)

(*n*) See Allen's Rules, 26. See also Rule of Michs. T. 1859, *post*, as to the necessary statements in the affidavit, and the Rule of Hilary T. 1865, as to the service of notices.

Subpœna to prove the execution of Deeds in order to be Registered.

Whereas by the Act of Assembly 10th Victoria, cap. 42, it is enacted, "that process of Subpœna may be issued out of the Supreme Court of Judicature as in ordinary cases, (and in such form as the said Court may by general rule or order prescribe,) to compel the attendance of any witness, or the production of any conveyance or instrument for the due proof thereof, in order to be registered agreeably to the provisions of this Act; and such Court shall have the like power to punish disobedience to any such Subpœna, in the same manner and to the same extent as in other cases; provided that no such witness shall be compelled to produce, under such Subpœna, any writing or other document that he would not be compelled to produce on a trial:" It is Ordered, That the several processes of Subpœna to be used under and in pursuance of the above recited Act, shall be in the form or to the effect following:—

No. 1. *Subpœna ad Testificandum.*

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To A. B., [*names of the witness or witnesses*] Greeting:—

We command you that, laying aside all and singular business and excuses, you and every of you be and appear in your proper persons before [*name and description of the Court, Judge, or other Officer before whom proof is to be made,*] at [*the place or office where proof is to be made,*] on —— the —— day of ——, at —— of the clock in the ——noon of the same day, to testify all and singular those things which you or either of you know concerning the execution of a certain [*describe the conveyance or instrument to be proved,*] purporting to be made between [*the parties to the deed or instrument,*] and bearing date the —— day of ——, A. D. 18 , to which [*deed or instrument*] you and each of you were severally a subscribing witness or witnesses; and further to prove the execution of the said ——*, in order that the same may be duly registered according to the provisions of the Act of Assembly in such

case made and provided; and this you or any of you shall in no wise omit, under the penalty upon each of you of one hundred pounds.—Witness —— Esquire, at Fredericton, the —— day of ——, in the —— year of our Reign.

No. 2. *Subpœna duces tecum.*

[*The same as the above to the asterisk* *, *then thus*]—and also that you bring with you, and produce at the time and place aforesaid, the said [*describe the deed or instrument*] hereinbefore mentioned and described, in order that the same may be duly registered, &c. [*conclude as in the preceding form.*]

HILARY TERM, 13th VICTORIA, A. D. 1850.

Trial by the Record.

I. It is Ordered, That if the party who may have given the Notice of Trial by the Record, pursuant to the Rule of Trinity Term, 9th Victoria, (*o*) shall not enter the same for Trial on the first day of Term, as required by such Rule, the other party may move to enter the same for Trial on the second day of Term, and proceed to trial at such time as the Court may thereupon appoint, on delivering to the Chief Justice a Paper Book, in case such Book should not already have been delivered.

(*o*) See Allen's Rules, 50.

II. It is further Ordered, That either party may give Notice of Trial by the Record, and enter the same pursuant to the Rule of Trinity Term, 9th Victoria—but that if Notice be given by both parties, the Notice of the party seeking to perfect the Record shall have precedence, provided he duly enter the case, and deliver the Paper Book to the Chief Justice.

EASTER TERM, 13th VICTORIA, A. D. 1850.

Service of Process at Dwelling.

I. Whereas by the Act of Assembly 12th Victoria, cap. 39, sec. 44, the Act of Assembly 7th William 4, cap. 14, allowing service of Process to be made at the usual place of abode of the defendants, is repealed; and the said Act of 12th Victoria limits and restricts service of Process at the dwelling to cases where the defendant shall be within the jurisdiction of the Court, at the time of such service; and the Rule No. 2 of this Court of Trinity Term, 3rd Victoria, is thereby virtually superseded: It is Ordered, That such Rule be rescinded,

and that the affidavit of such service shall be in the following form, or to that effect, in order to entitle the plaintiff to an order (*p*) for perfecting such service:—

"A. B., Sheriff of ——, (*or* A. B., of ——, a Deputy of the Sheriff of ——,) maketh oath and saith, that he, this deponent, did, on the —— day of ——, deliver a true copy of the annexed writ or process at the house of C. D., the defendant named in such writ or process, (*or* the house of any other person, *as the case may be*,) situate in the Parish of ——, in the County of ——, unto E. F., the wife of such defendant, (*or* to G. H., an adult person residing in the said house, and known to this deponent as a member or inmate of the family of such defendant); and this deponent further saith, that the said house was at the time of such delivery the usual place of abode of such defendant, [and that the said copy of the said process was accompanied with an English notice in writing to the defendant, of the intent and meaning of the service of such process, pursuant to the Statute in such case made and provided];* and this deponent further saith, that the said defendant was at the time of such service within the limits of this Province, as this deponent knows, for the following reasons, (*here state the particular means of knowledge the deponent has of the defendant's being within the Province; if this fact is not known to the serving officer it may be proved by the affidavit of another person; and the affidavit of the serving officer may omit the words after the * and conclude as follows*:—) and this deponent further saith, that he verily believes that at the time of such service the defendant was within this Province."

(The clause between brackets may be omitted in the service of Summary writs.)

(*p*) Where a writ was not served personally, and no Judge's order was obtained to perfect the service, according to the Act 7 Wm. 4 c. 14, (which in this respect was similar to the Act 12 Vic. c. 39,) and the defendant denied any knowledge of the suit, the judgment and execution were set aside, though the defendant's affidavit of ignorance of the suit was contradicted. James v Dupres, 1 Allen 506. In this case, Chipman C. J. is reported to have said—"The law requires a Judge's order to make the service perfect, and we cannot dispense with it." But it is clear that a Judge's order may be dispensed with; and in that case, both Carter J. and Street J. admit that it might be waived by the conduct of the defendant, and state as their reasons for setting aside the judgment, that the affidavits did not clearly make out the waiver. In O'Regan v Berrymount, 1 Kerr 167, which was very fully argued, and where all the English authorities were reviewed, the Court refused to set aside the judgment, though the service was not perfected, where it appeared that the defendant knew that the suit was going on, and after final judgment gave a new security for the amount. In O'Leary v Graham, decided in Hilary Term 1861, the judgment was sustained though there was no Judge's order, and the defendant denied any knowledge of the existence of the suit until he

was arrested on the execution—the Court being satisfied that he had received the copy of process left at his house, and knew that the suit was proceeding, his explanation of the matter not being satisfactory. It is, perhaps, difficult to define exactly what will amount to a waiver of the irregularity; each case must depend upon its own particular circumstances; and though a judgment obtained without personal service of process, or an order to perfect the service, is clearly irregular, the inclination of the Court appears to be to sustain the judgment wherever it appears that the writ came to the knowledge of the defendant in time to enable him to appear, if he wished to defend the suit.

II. It is further Ordered, That in order to entitle the plaintiff to an order for making a service at the dwelling good service, the writ or process shall be delivered to the Sheriff of the County into which it is issued for service, and that such service be effected, and the affidavit thereof made by the Sheriff, or his general or special Deputy.

III. It is further Ordered, That these Rules shall apply *mutatis mutandis* to writs directed to the Coroner.

IV. It is further Ordered, That these Rules apply to every writ or process issued after the end of the present Term.

Trinity Term, 13th Victoria, A. D. 1850.

Notice of Matter of Defence, 13 Vic. c. 32.

It is Ordered, That a copy of the notice of any matter of defence delivered with the plea, pursuant to the Act 13th Victoria, cap. 32, and a copy of any order of the Court or a Judge which shall have been made touching such notice, shall be filed with the *Nisi Prius* record at the Court of *Nisi Prius*, and be annexed to such record. (*q*)

(*q*) A special plea cannot operate as a notice under the Act. Robinson v Palmer, 2 Allen, 223. The notice should state the grounds of defence with reasonable certainty, and shew in substance that the matter alleged would have been pleadable in bar. LeGal v Duffy, 3 Allen, 57. But a notice in an action for libel, stating that the allegations contained in the writing complained of are true, is sufficient, it not appearing that the plaintiff was misled by the generality of it. Lang v Gilbert, 4 Allen, 359. Proof of the matter stated in the notice will not entitle the defendant to a verdict, unless it amounts to a legal defence; Whelpley v Riley, 2 Allen, 275; and if the matter stated is no defence, the notice will be set aside with costs. Dowling v Trites, 2 Allen, 520; Wilson v Street, *ibid.* 629. Where defendant pleaded two pleas and gave a notice of defence of other matters, it was held that the plaintiff should have applied to a Judge to set them aside, and was not justified in treating them as nullities. Oulton v Palmer, 2 Allen, 364. See also Rule of Easter T. 1859, *post*, as to the time and manner of objecting to the sufficiency of notices.

Hilary Term, 15th Victoria, A. D. 1852.

Attachment.

It is Ordered, That in future no attachment do issue unless taken out in the Term during which the same may have been granted, or in the vacation next succeeding the same, without the order of the Court, or a Judge.

EASTER TERM, 18th VICTORIA, A. D. 1855.

New Trial from York Sittings.

It is Ordered, That when a Rule *nisi* for a new trial—or of the like kind—has been granted in a cause tried at the Sittings for the County of York, the case shall be entered by the Clerk on the special paper for the Term at which the Rule is granted, without its being necessary to serve the Rule *nisi* as in other cases, unless the Court shall order the same to be served; and the cause shall be called on for argument in the order in which it is entered. (*r*)

(*r*) See Allen's Rules 33, as to the notice of motion.

In reference to the Act of Assembly 18th Victoria, Chapter 24, intituled "An Act relating to Jurors," it is ordered as follows:—

Duty of Clerk as to Jury.

1. The Clerk at any Circuit Court or Sittings, shall enter on the Minutes the time when the Jury retire to consider of their verdict, and also the time when the Jury return into Court to deliver their verdict.

2. If they return within two hours, the verdict shall be taken and entered in manner heretofore accustomed.

3. If they return after the lapse of two hours, after they are called over by their names and answer thereto, they shall be asked thus—Gentlemen of the Jury, are you all agreed on your verdict, or how many and which of you are agreed thereupon?

If they shall answer that they are all agreed, the verdict shall be taken and entered in the usual manner. If they shall answer that they are not all agreed, but that five (*or* six) are agreed, the names of the Jurors by whom the verdict is so returned shall be taken and entered in the Minutes, and the verdict shall be recorded as follows:—

The Jury having considered of their verdict, and not being able all to agree within two hours, five (*or* six) of their number, namely, A. B., [*the names to be here specified,*] do say that they do find [*the finding to be here stated.*]

This entry shall then be read over to the Jury distinctly, and shall be returned on the Postea as follows:—

Postea.

[*Commencing in the ordinary form.*]

And the Jurors of that Jury being summoned also come, who to speak the truth of the matters within contained, are

chosen, tried, and sworn, and having retired to consider of their verdict, and not being able to agree within two hours, five (*or* six) of their number, namely, [*here set forth the names,*] pursuant to the Act of Assembly relating to Jurors, say upon their oath, [*here state the verdict.*]

Oath of Constable.

4. The oath of the Constable who shall have charge of the Jury, shall be as follows:—

You shall keep this Jury together in one of the Jury Rooms of this Court House [*or as the place may be,*] until their verdict is agreed on, or the Court shall otherwise order; you shall not suffer any person to speak to them, or any of them, neither shall you yourself speak to them, unless it be to ask if they are agreed on their verdict, except by direction of the Court.—So help you God.

MICHAELMAS TERM, 19th VICTORIA, A. D. 1855.

Equity Appeal Paper.

It is Ordered, That a Paper be prepared by the Clerk of the Court on the Equity side, and delivered to the Court on the first day of each Term, containing a List of the Causes in Equity in which appeals are to be heard, which shall be called the Equity Appeal Paper, and the Causes therein shall come on to be heard in order next after the Special Paper of the same Term.

EASTER TERM, 19th VICTORIA, A. D. 1856.

It is Ordered, That any Barrister of the Supreme or Superior Court or Courts of any of Her Majesty's Colonies or Possessions in North America, Bermuda, or the West Indies, and entitled to practice as such in all the Supreme Courts of that Colony or Possession in which he may have been originally admitted a Barrister, may upon the recommendation of the Barristers' Society, be called, sworn, and enrolled a Barrister of this Court, and entitled to the rights and privileges as such so long as he shall be a member of the said Barristers' Society; provided always, that no such Barrister of any other British Colony or Possession shall be entitled to be admitted a Barrister of this Court, unless it be proved to the satisfaction of this Court, that a Barrister of this Court would be entitled to like rights and privileges in all the Superior Courts of that Colony or Possession in which the applicant may have been originally admitted a Barrister.

MICHAELMAS TERM, 20th VICTORIA, A. D. 1856.

Entry on Judgment Roll of Interest on Damages.

It is Ordered, That where interest is awarded under the Act of Assembly 12th Victoria, cap. 39, sec. 29, (*s*) the entry on the Judgment roll shall be in the form following, or to the like effect:—

"Therefore it is considered that the said plaintiff do recover against the said defendant, &c. &c. &c., together with —— now adjudged by the Court here to the said plaintiff for interest upon the said damages (*or* debt) pursuant to the Act of Assembly in such case made and provided, because the final judgment has been delayed by the act of the defendant; and also —— for his costs and charges, &c. &c. &c., which said damages, interest, costs, and charges, amount in the whole to ——."

(*s*) By the Act 23 Vic. c. 25, interest is recoverable after the signing of the judgment, and may be levied with the damages and costs, if a direction to that effect is indorsed on the execution.

TRINITY TERM, 20th VICTORIA, A. D. 1857.

Interlocutory Judgment.

It is Ordered, That from and after the present Term, in every Memorandum of Interlocutory judgment, the Term at which the writ has been made returnable be specified on the margin or at the foot of the Memorandum, and that it be also stated whether the action is summary or not summary.

Warrant of Attorney to confess Judgment.

I. It is Ordered, That in no case where the Warrant of Attorney to confess judgment appears to have been executed, not personally, but by an Attorney or Agent in the name of the Principal, shall any confession be signed thereon by an Attorney of this Court, unless the deed or other power conveying the authority to execute the Warrant, together with an affidavit of the due execution thereof by the principal, be produced to, and read and examined by the Attorney who is applied to to sign the confession, before signing the same; nor shall judgment be entered upon any such confession unless such deed or other power, and affidavit of execution, be produced to the Clerk, and filed with the Warrant of Attorney and confession. (*t*)

(*t*) Before this rule, it was held that a party in whose name a bond and warrant of attorney had been executed without authority, might bind himself by a subsequent recognition; and that such recognition might be implied

from his conduct—as, where knowing of the bond and warrant of attorney and judgment thereon, he allowed them to stand for three years without objection, and continued to deal with the plaintiff on the security of them. Hutchinson v Johnston, 4 Allen 40. The above rule was framed in consequence of this case. See also, Rule 2 Easter Term 1848, *ante* p. 133.

II. It is further Ordered, That if such deed or other power bear date or appear to have been given more than a year and a day before the application to sign judgment, no judgment be entered thereupon without the order of a Judge, nor after ten years without a rule of Court founded on a previous rule *nisi*, as is now the practice in regard to Warrants of Attorney of those respective dates.

III. It is further Ordered, That every Warrant of Attorney to confess judgment; and every deed or other power by which authority is granted to execute the Warrant, bear date of the day upon which the same are respectively executed; and if it should happen that such Warrant of Attorney, deed, or other power, is to be given by two or more persons who cannot conveniently execute the same on the same day, then the warrant, deed, or power, shall bear date of the day on which it shall be first executed; and the day on which any subsequent execution shall take place shall be specified in the attestation of the subscribing witness or witnesses to such execution.

IV. It is further Ordered, That every Attorney signing a confession of judgment upon a Warrant of Attorney, do annex to his signature the date of signing, and do mark with his name, or initial letters of his name, the said Warrant of Attorney, and also any deed or power under which the Warrant is executed, where the execution is not personal. (*u*)

(*u*) The omission to comply with the directions of this rule does not render the judgment void. It is a mere irregularity, which may be waived by delay. The Clerk should refuse to sign the judgment where the rule is not complied with Levi v Muzeroll, 3 Allen 598.

Service of Process on Non-residents.

It is Ordered, That where service of process is made on persons resident out of the Province, under the Act of Assembly 14 Victoria, cap. 2, the nature and place of the business carried on by the defendant in the Province, and the particular nature of the agency or employment of the person with whom the copy of Process may have been left for the defendant, be stated in the affidavit of the Sheriff or Deputy Sheriff making such service, or otherwise proved by affidavit

to the satisfaction of the Judge, before any order is made for perfecting such service. (*v*)

(*v*) See also Act 18 Vic. c. 25, relating to the service of process out of the jurisdiction of the Court; and Crane v Cazenove, 4 Allen, 578.

HILARY TERM, 21st VICTORIA, A. D. 1858.

Admission of Attorneys.

It is Ordered, That the privilege granted by the Rule of Court to Students applying for admission as Attorneys, and to Attorneys applying for admission as Barristers, when such Students and Attorneys are Graduates of some College or University, be confined to Graduates of some University situate within the British Dominions; but that such order shall not apply to any Student already entered.

MICHAELMAS TERM, 22nd VICTORIA, A. D. 1858.

It is Ordered, That when upon the trial of any action of replevin, the defence arises under the 15th & 16th Sections of Chapter 126 of the Revised Statutes, and upon the plea of *non cepit* a verdict is found for the defendant, (*w*) the *postea* be in the form following, with such variations as the case may require :—

"Afterwards, &c. [*in the usual form*] say upon their oaths, that the said defendant did take and detain the said goods and chattels mentioned in the said declaration, as a distress for rent upon certain premises enjoyed by the said plaintiff under a grant or demise at a certain rent, and that there was due to the defendant for such rent at the time of making the distress, and still is due the sum of ——, and they assess the damages of the said defendant by reason of the premises for the said rent, and the costs and charges of making the said distress, at the sum of ——, pursuant to Chapter 126 of the Revised Statutes, besides his costs and charges, &c."

If the Bailiff of the landlord, or any one acting in aid of the landlord, be made a defendant, the *postea* may be varied, as follows :—

"And that there was due to the defendant, C. D., &c. [*as before*] and that the said defendant, E. F., was, at the time of making the said distress, the Bailiff of the said C. D.," *or* "that the said E. F. was then and there present, aiding and assisting the said C. D. in making the said distress, &c."

And that the entry of judgment on the said *postea* be in

the form following, with the requisite variations as before, according to the circumstances of the case:—

"Therefore it is considered that the said plaintiff take nothing by his suit, but that the said defendant do go thereof without day, &c.; and it is further considered, that the said defendant (*or* that the said defendant C. D.) do recover against the said plaintiff the said sum of ——, for his damages so assessed as aforesaid, and also —— for his costs and charges, by the Court of our said Lady the Queen now here adjudged to the said defendant, according to the said Revised Statutes; which said damages, costs and charges in the whole amount to ——, and that the said defendant have execution thereof."

(*w*) The defendant in replevin is entitled to damages on a verdict in his favor on the plea of *non cepit*, if he gives such evidence as would have supported an avowry under the former law; and whatever the plaintiff might formerly have pleaded to an avowry, he may since the Revised Statutes, give in evidence in answer to the defence under the plea of *non cepit*. Myers v Smith, 4 Allen, 207.

EASTER TERM, 22nd VICTORIA, A. D. 1859.

Notice of Defence.

It is Ordered, That when a notice delivered under the Act of Assembly, 13th Victoria, cap. 32, includes several distinct grounds of defence which would, before such Act, have required separate pleas, such separate grounds of defence be numbered consecutively and placed in several clauses; but any objection to the form of the notice, on the ground of duplicity, must be made to a Judge within fourteen days after the same is delivered, who will upon summons, make such order for allowance or disallowance of the notice, or amendment of the same, and on such terms as the case may require; and no objection to the notice on the ground of duplicity will be allowed at the trial of the cause. (*x*)

(*x*) See Rule of Trinity Term 1850, *ante* p. 138.

TRINITY TERM, 22nd VICTORIA, A. D. 1859.

Judgment Roll on offer to suffer Judgment by default.

1. It is Ordered, That in any case (not summary) where, under the provisions of the Act of Assembly, 18th Victoria, cap. 9, an offer and consent in writing has been filed by the defendant, to suffer judgment by default, (*y*) for a certain specified sum as debt or damages, (as the case may be) and the plaintiff has not, after due notice thereof, filed his acceptance of such offer, but has taken the case down to trial, and has

recovered a verdict, but not for a greater sum than the sum so offered, the entry or suggestion on the Judgment Roll shall be as follows:—

"And now, pursuant to the Act of Assembly passed in the eighteenth year of the Reign of Queen Victoria, entitled 'An Act concerning Tender in Actions at Law and Suits in Equity,' on the —— day of —— in the year of our Lord —— the said defendant C. D., files in the Office of the Clerk of the Pleas of this Court, an offer or consent in writing in the words following:—[*insert the offer*]—which offer and consent the said plaintiff A. B., has not accepted; therefore the issue joined between the parties remains to be tried: Therefore let a jury thereupon come, &c." [*as in ordinary cases, to the conclusion of the postea,*] and then proceed as follows:—

"And inasmuch as it appears by the said return, that the debt [*or damages*] was not greater in amount than the sum for which the said C. D. offered to suffer judgment by default, it is considered that the said A. B. do recover his said debt [*or damages*] so assessed at the sum of ——, together with his costs and charges by him about his suit in this behalf expended, up to the said —— day of ——, and for these costs and charges to ——, which said debt, [*or damages*] costs and charges in the whole, amount to ——, and that the said A. B. have execution thereof. And it is further considered that the said C. D. do recover against the said A. B. —— for his costs and charges by him incurred after the said —— day of ——, and that he have execution thereof."

(*y*) An offer to suffer judgment under this Act may be filed before declaration. Gibson v Bateman, 4 Allen 598. The offer must be signed by the defendant in the cause, and not by his Attorney, Wetmore v DesBrisay, *ibid* 356. An offer which has not been accepted, will not prevent the defendant from obtaining judgment as in case of a non-suit. Thomas v Demill, 3 Allen 407.

Surviving Parties.

2. In summary causes, when one of the several plaintiffs or defendants shall happen to die after the commencement of the action, the subsequent proceedings shall be in the name of or against the surviving plaintiff or plaintiffs, or defendant or defendants, as the case may be; describing him or them respectively, as survivor or survivors of A. B., who hath died since the commencement of this suit, and who was a joint plaintiff or defendant therein. (*z*)

(*z*) See Crone v Goodine, 4 Allen 371.

MICHAELMAS TERM, 23rd VICTORIA, A. D. 1859.

Judgment as in case of a non-suit.

It is Ordered, That in future the affidavit on which motion is made for Judgment as in case of a non-suit for not proceeding to trial according to the practice of the Court, (where notice of trial has not been given,) do state the particular Term in or before which issue has been joined, or do state some particular day in vacation on or before which issue has been joined. (*a*)

(*a*) See Rule of Trinity Term, 1849, *ante* p. 134.

HILARY TERM, 23rd VICTORIA, A. D. 1860.

New Trials for York.

It is Ordered, That the Rule of Court of Michaelmas Term 1st Victoria, No. 10, relating to motions for new trials in causes tried at the Sittings for the County of York, shall not apply to causes tried at the Sittings holden in January in each year, but that motions for new trials in causes tried at the said last mentioned Sittings, shall be made as in causes tried at any of the Circuit Courts. (*b*)

(*b*) See Rule of Easter Term, 1855, *ante* p. 139; also Allen's Rules, 23, 33.

TRINITY TERM, 23rd VICTORIA, A. D. 1860.

Crown Office.

It is Ordered, That the following Regulations be observed in the Office of the Clerk of the Crown in this Court:—

Blank Writs issued by Clerk.

1. Blank Writs of Habeas Corpus, and any others which require the fiat of a Judge to be endorsed thereon before they can be issued for the purpose of being executed, and Blank Writs of Subpœna, may be delivered to the respective Attorneys of this Court signed and sealed, to be by them filled up as occasion may require; they accounting to the Clerk therefor, and forwarding to his office proper prœcipes for such of the said Writs as they may from time to time fill up and issue, stating in the prœcipes the name of the Judge whose fiat has been indorsed, where a fiat is necessary.

2. No other Blank Writs than those above specified, to be signed and sealed; nor shall any mere blank pieces of parchment be signed and sealed by the Clerk of the Crown.

Writs of Attachment.

3. Where Writs of Attachment or other Writs are issued out of the Crown Office upon a Rule of Court therefor, or

by order of a Judge, the Clerk shall at the time of signing and sealing the Writ, put at the foot thereof, or indorse thereon, a memorandum in the form following, or to that effect, as the case may be:—

"By Rule of Court of ——— Term, A. D. 18—," *or* "By Order of the Chief Justice or Mr. Justice ——, dated ——, filed in the Crown Office."

HILARY TERM, 25th VICTORIA, A. D. 1862.

It is Ordered, That from and after the first day of Easter Term next, the article called and known as *patent parchment*, be not used for the Writs and Records of this Court. (c)

(c) See Burns v Burns, 4 Allen, 223.

HILARY TERM, 26th VICTORIA, A. D. 1863.

It is Ordered, That no person shall be held to Bail upon the Judgment of the Court of any Foreign Country, or of any British Colony, without a Judge's order.

Divorce and Matrimonial Appeal Papers.

It is Ordered, That the Clerk of the Pleas do keep a Paper, to be called the Divorce and Matrimonial Appeal Paper, in which shall be entered all Appeals from decisions of the Court of Divorce and Matrimonial Causes; such entries to be made on or before the first day of the Term next after the decisions in the said Court; such appeals to be heard next after the Equity appeal paper.

Divorce and Matrimonial Causes.

It is Ordered, That upon hearing of an appeal from the Court of Divorce and Matrimonial Causes, pursuant to the Act of Assembly, 23rd Victoria, cap. 37, it shall be the duty of the appellant to procure and file with the Clerk of the Pleas in this Court, certified copies of the libel and answer and Decree; and that on hearing the appeal, the evidence be received from the Report of the Judge of the Court of Divorce and Matrimonial Causes.

HILARY TERM, 28th VICTORIA, A. D. 1865.

Service on an Attorney.

Ordered, That no service of any paper on an Attorney in any cause, shall be deemed good service by leaving such paper at his dwelling house or last place of abode, unless it

shall appear by the affidavit of service that the Attorney has no Office, or if having an Office, that the same was closed, or if open, that there was no person in such Office upon whom service could be made; in any of which cases, leaving the same at the dwelling house or last place of residence of the Attorney, shall be deemed sufficient service thereof. (*d*)

(*d*) This restrains the 11th Rule of Easter Term, 1785. See Allen's Rules, 4.

MICHAELMAS TERM, 29th VICTORIA, A. D. 1865.

Motion Day.

It is Ordered, That Tuesday in the second week (*e*) of each Term shall be the regular day for motions, instead of Saturday of that week; on which day, motions shall have the precedence of the ordinary business, which however shall be proceeded with after the motions are concluded;—

Provided, however, that one or more of the Judges will sit in Court on the second Saturday, whenever occasion may require.

(*e*) Motions, distinguished as "common motions," of which no notice has been given, and which are not entered on the Motion paper, will be heard on this day.

ACTS OF ASSEMBLY

REFERRING TO

PRACTICE AND EVIDENCE.

21 VICTORIA, CAP. XX.

An Act to amend the Practice of the Law

Section.
1. Writs may bear teste on the day of issue.
2. Bill of York abolished.
3. Appearance; judgment by default; special bail.
4. Common bail pieces unnecessary; sufficient appearance, what.
5. Declaration in trespass; or trespass on the case.
6. Signing Judgment in summary cases.

Passed 6th April, 1858.

BE it enacted by the Lieutenant Governor, Legislative Council, and Assembly, as follows:—

1. That from and after the passing of this Act, all Writs to be issued from any of the Courts in this Province, may bear teste on the day on which such Writs shall be issued, any law, usage or custom to the contrary thereof in any wise notwithstanding.

2. That writs of capias, bailable or non-bailable, may issue and take effect in the County of York in like manner as in other Counties; and the Bill of York is hereby abolished.

3. That the defendant in all cases shall have thirty days to appear to a non-bailable process, and to enter special bail to a bailable process, from the return day of such process; and in summary actions, if the defendant do not enter his appearance and plead within the time aforesaid, judgment may be entered against him by default; or, if the case be bailable, and the defendant should fail to enter special bail within thirty days after the return day of the writ, the plaintiff may proceed against the Sheriff, or on the bail bond, as in ordinary cases.

4. That common bail pieces shall not be necessary in any case, nor shall any costs be taxed for the same; that notice of appearance served on the plaintiff's attorney, and a copy of the same filed in the office of the Clerk of the Court out of which the process issued, for which copy to be filed a charge of six pence only shall be allowed, shall be deemed a sufficient appearance.

5. That in all actions of trespass and trespass on the case, the declaration shall be equally good and valid to all intents and purposes, whether the same shall be in form a declaration in trespass, or trespass on the case. (*a*)

(*a*) Refer to Brown v Thompson, 4 Allen, 228, and Lipsett v M'Laggan, (not reported,) Judgment Easter Term, 1863.

6. That the party in whose favour the verdict may be given in summary actions, shall be entitled to sign judgment thereon immediately after the verdict, any thing in the Act passed in the fifth year of the Reign of His late Majesty King William the Fourth, intituled *An Act to provide for the more convenient administration of Justice in the Supreme Court*, to the contrary notwithstanding.

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21 VICTORIA, CAP. XXIV.

An Act in addition to Chapter 113, of Title XXX, of the Revised Statutes, 'Of Judgments, Executions, and Proceedings thereon.'

How Registry of Memorial of Judgment to be cancelled, when judgment set aside.

Passed 6th April, 1858.

Be it enacted by the Lieutenant Governor, Legislative Council, and Assembly,—That when any judgment of the Supreme Court, of which a memorial shall have been registered, shall be set aside, annulled or altered by any rule or order of the said Court, a copy of the said rule or order, certified under the hand of the Clerk of the Pleas, whose signature shall be proved by affidavit, to be made by any person who shall have seen him sign the same, before any Judge of the said Court or Commissioner for taking affidavits in the said Court, shall be registered in the same office where the memorial shall have been registered, and the Registrar shall in the margin of the entry of memorial make a memorandum referring to the book and page wherein the said rule or order may be registered, and the memorial shall have no other or greater effect as a charge on the lands than is allowed by such rule or order.

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22 VICTORIA, CAP. XXI.

An Act to modify the Laws relating to Interest and Usury.

Section.
1. Cap. 102, Rev. Stat. repealed.
2. Interest limited to 6 per cent.; but contract for more not void.
3. Excess to be deducted on suit.
4. Banks limited to 6 per cent.; forfeiture.
5. How previous contracts to be dealt with.
6. What contracts Act shall not extend to.

Passed 13*th April*, 1859.

BE it enacted by the Lieutenant Governor, Legislative Council, and Assembly, as follows:—

1. That from and after the passing of this Act, Chapter 102, Title XXIII, of the Revised Statutes, 'Of Interest and Usury,' be and the same is hereby repealed, except as hereinafter provided by the fifth Section of this Act.

2. No person shall directly or indirectly receive on any contract to be made for the loan of any money or goods, more than six pounds for the forbearance of one hundred pounds for one year, and after that rate for a greater or lesser sum, and a longer or shorter time; but no deed or contract for payment of any money hereafter loaned, or for the forbearance of any thing undertaken, upon or by which more than such rate of interest shall be reserved or received, shall be hereafter deemed void.

3. In any action brought on any contract whatsoever, in which there is directly or indirectly taken or reserved a rate of interest exceeding that authorized in Section second, the defendant, or his attorney, may under the general issue, with notice of defence as in other cases, prove such excessive interest, and it shall be deducted from the amount due on such contract.

4. Provided always, that it shall not be lawful for any Bank incorporated by an Act of the Legislature of this Province, or by Royal Charter, to stipulate for, take, reserve, or exact a higher rate than six per cent. per annum; and whenever any such Bank shall, upon any such deed or contract, receive or reserve, by means of any loan, bargain, exchange, or transfer of any money or goods, or by any deceitful means, for the forbearing, or giving day of payment beyond a year, of its money or goods, more than six pounds for one hundred pounds for one year, and after that rate for a greater or lesser sum, and longer or shorter time, it shall forfeit for every offence the value of the principal sum

or goods so loaned, bargained, exchanged, or transferred, together with all interest and other profits accruing therefrom, one moiety to be paid to the Queen for the use of the Province, and the other moiety to the person suing for the same, to be recovered by any action in any Court of Record in the County where the offence may be committed, which action shall be brought within twelve months from the time of such offence.

5. Nothing in this Act shall extend to or be construed to extend to contracts or securities entered into before the passing of this Act, or to legalize any usurious contract, security, or loan, made, entered into, given, or taken before the passing of this Act, but all such contracts, securities, or loans, shall be construed, considered, and dealt with as well in civil suits as in proceedings for penalties, as if this Act had not been passed; and for all such cases, Chapter 102, of Title XXIII, of the Revised Statutes, 'Of Interest and Usury,' shall be considered in force and unrepealed.

6. That nothing in this Act contained shall extend or be construed to extend to Bottomry Bonds or Contracts on the bottom of any Vessel, damages, or protested Bills allowed by law, penalties incurred for the non-fulfilment of any contract where such penalties are mutually binding, and contracts for the loan or hire of any grain, cattle, or live stock, let out as the parties may agree, if the lender takes the risk of casualties upon himself, in which case the borrower shall not avail himself of any loss suffered through his wilful neglect, or any voluntary damage which may be committed by him.

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22 VICTORIA, CAP. XXII.

An Act in amendment of Chapter 116, Title XXX, of the Revised Statutes, 'Of Bills, Notes, and Choses in Action.'

Section.
1. Damages on Foreign and Colonial Bills of Exchange.
2. Sec. 1, cap. 116, Rev. Stat. repealed.
3. When Bills of Exchange and Promissory Notes shall be due in certain cases.
4. Evidence of presentment and dishonor.

Passed 13th April, 1859.

BE it enacted by the Lieutenant Governor, Legislative Council, and Assembly, as follows:—

1. Whenever any Bill of Exchange drawn or indorsed within the Province, and payable in any part of North America without the Province, or in Prince Edward Island, or in the Island of Newfoundland, shall be returned protested, the party liable for the contents of such Bill shall, upon due notice and demand, pay the same with damages at the rate of two and one half per cent. upon the contents thereof, with lawful interest and charges on the said contents, to be computed from the date of the protest to the time of payment; and whenever any Bill of Exchange so drawn or indorsed, and payable in Europe, or in the West Indies, or in any other place without the Province than as first recited, shall be returned protested, the party liable for the contents of such Bill shall, on due notice and demand thereof, pay the same at the current rate of exchange at the time of demand, and damages at the rate of five per cent. upon the contents thereof, with lawful interest and charges on the said contents, to be computed from the date of the protest to the time of payment, and such respective amounts of contents, damages, interest, and charges, shall be in full of all damages, charges, and expenses.

2. The first Section of Chapter 116, Title XXX, of the Revised Statutes, 'Of Bills, Notes, and Choses in Action,' is hereby repealed.

3. From and after the first day of June next, where Bills of Exchange and Promissory Notes become due and payable on the first day of January commonly called New Year's Day, Christmas Day, Good Friday, or Day appointed by Proclamation of the Governor of this Province for a Day of Fast, Thanksgiving, or general Holiday, the same shall be payable on the day next preceding such New Year's Day, Christmas Day, Good Friday, Day of Fast, or Day of Thanksgiving, or general Holiday, unless the day preceding such New Year's Day, Christmas Day, Day of Fast, or Day of Thanksgiving, shall happen to be Sunday, in which case such Bills of Exchange and Promissory Notes shall fall due on the Saturday preceding; and such Bills of Exchange and Promissory Notes, in case of non-payment, may be noted and protested on the day preceding such New Year's Day, Christmas Day, Good Friday, Day of Fast, or Day of Thanksgiving, or general Holiday, unless the preceding day be

Sunday, and then the same Bills of Exchange and Promissory Notes may be noted and protested on the preceding Saturday; and that as well in such cases, as in the cases of Bills of Exchange and Promissory Notes becoming due and payable on the day next preceding such New Year's Day, Christmas Day, Good Friday, Day of Fast, or Day of Thanksgiving, or general Holiday, it shall not be necessary for the holders of such Bills of Exchange and Promissory Notes to give notice of the dishonor thereof, until the day next after such New Year's Day, Christmas Day, Good Friday, Day of Fast, or Day of Thanksgiving, or general Holiday; and that whensoever such New Year's Day, Christmas Day, Day of Fast, or Day of Thanksgiving, or general Holiday, shall happen or be appointed on a Saturday, it shall not be necessary for the holder or holders of such Bills of Exchange or Promissory Notes, as shall by virtue of this Act or otherwise be payable on the preceding Friday, to give notice of the dishonor thereof until the Monday next after such New Year's Day, Christmas Day, Day of Fast, or Day of Thanksgiving, or general Holiday, respectively; and that whensoever such New Year's Day, Christmas Day, Day of Fast, or Day of Thanksgiving, or general Holiday, shall happen or be appointed on Monday, it shall not be necessary for the holder or holders of such Bills of Exchange or Promissory Notes, as by virtue of this Act or otherwise shall be payable on the preceding Saturday, to give notice of the dishonor thereof until the Tuesday next after such New Year's Day, Christmas Day, Day of Fast, or Day of Thanksgiving, or general Holiday, respectively; and from and after the said first day of June next, New Year's Day, Christmas Day, Good Friday, and every such Day of Fast, and Day of Thanksgiving, or general Holiday, so appointed by the Governor of this Province, is and shall for all other purposes whatsoever, as regards Bills of Exchange and Promissory Notes, be treated and considered as the Lord's Day, commonly called Sunday.

4. Where any Promissory Note or Bill of Exchange shall be payable at any place out of this Province, whether the same be drawn in or out of this Province, a Notarial protest of the presentment and dishonor of such Promissory Note or Bill of Exchange shall be deemed and taken in all Courts

of this Province as evidence of the fact of presentment and dishonor stated in such protest, in the like manner as in cases of a protest of non-payment of a Foreign Bill of Exchange.

23 VICTORIA, CAP. XXX.

An Act in further amendment of the Law.

Section.
1. Bail may render principal to County gaol any time before return of process.
2. Sheriff may take new bail.
3. Sheriff of St. John may reside within three miles of the Court House.

Passed 9th April, 1860.

BE it enacted by the Lieutenant Governor, Legislative Council, and Assembly, as follows:—

1. That any person being bail to any Sheriff for the appearance of any person arrested under any mesne process issued out of any Court, may at any time before the return of such process, render the principal to the gaol of the County in which such process was executed, as provided in Sections thirteen, fourteen and fifteen of the Act of Assembly twelfth Victoria, Chapter thirty nine, intituled *An Act to consolidate and amend various Acts of Assembly relating to the further amendment of the Law.* (*b*)

(*b*) In Scovil v Burk, Trin. Term, 1864, the Court held that under the 13th sec. of 12 Vic. c. 39, bail to the Sheriff might render the party after the time for putting in special bail had expired, without putting in special bail.

2. The Sheriff, upon such render being made, may take new bail for the appearance of such person as if no previous bond had been entered into.

3. That the Sheriff of the City and County of Saint John may be permitted to reside within three miles of the Court House in the said City and County.

23 VICTORIA, CAP. XXXI.

An Act to amend the Law relating to Guarantees, Bills of Exchange, and Promissory Notes.

Section.
1. Written guarantee not avoidable because consideration not stated in writing.
2. Effect of change in constitution of a Firm.
3. Judge may order loss of a negotiable instrument not to be set up.

Passed 9th April, 1860.

BE it enacted by the Lieutenant Governor, Legislative Council, and Assembly, as follows:—

1. No special promise to be made by any person after the passing of this Act, to answer for the debt, default or miscarriage of another person, being in writing and signed by the party to be charged therewith, or some person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding, to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

2. No promise to answer for the debt, default, or miscarriage of another, made to a Firm consisting of two or more persons, or to a single person trading under the name of a Firm, and no promise to answer for the debt, default or miscarriage of a Firm consisting of two or more persons, or of a single person trading under the name of a Firm, shall be binding on the person making such promise, in respect of any thing done or omitted to be done after a change shall have taken place in the constitution of the Firm, by the increase or diminution of the members thereof, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation, or by necessary implication from the nature of the Firm or otherwise.

3. In case of any action founded upon a Bill of Exchange, or other negotiable instrument, it shall be lawful for the Court or a Judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of a Court or Judge, or the Clerk of the Pleas, against the claims of any other person upon such negotiable instrument.

25 VICTORIA, CAP. XXV.

An Act in amendment of the Law relating to Judgments, Executions, and proceedings thereon.

Section.
1. Interest to run after judgment signed.
Section.
2. Interest, how recovered.

Passed 23*rd April*, 1862.

BE it enacted by the Lieutenant Governor, Legislative Council, and Assembly, as follows:—

1. That in all cases after the passing of this Act, in which judgment for any debt or damages should be duly signed in any Court of Record in this Province, interest may be recovered thereon from the time of signing of such judgment.

2. Such interest may be recovered by being endorsed to levy on the execution issued on such judgment.

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27 VICTORIA, CAP. XLI.

An Act relating to Foreign Judgments.

Passed 13*th April*, 1864.

BE it enacted by the Lieutenant Governor, Legislative Council, and Assembly—

That in any action now pending or hereafter to be instituted in any Court in this Province on a Foreign Judgment, where the defendant was not personally served with the original process or first proceeding in the suit, within the jurisdiction of the Court where the said judgment may be obtained, it shall be competent for the defendant to enter into the subject matter of such Foreign Judgment and to avail himself of any matter of law or fact which would have been available as a defence, had the action on which such judgment was had and obtained been originally brought and prosecuted in any of the Courts of this Province; provided always, that notice of such defence shall be given in like manner as is required by the course and practice of the said Courts, any law, usage or custom to the contrary notwithstanding.

LIST OF SOME OF THE MODERN REPORTERS, &c.

COURTS.	ABBREVIATIONS.	REPORTERS.
APPEAL.		
House of Lords,	H. L. Cas.	Clarke, New Series.
	Cl. & Fin.	Clark and Finnelley.
	Dow. P. C.	Dow.
	Dow & Cl.	Dow and Clark.
House of Lords, (Scotch Appeals.)	Macq. H. L. Cas.	Macqueen.
Privy Council,	Moore, P. C. C.	E. F. Moore.
Privy Council, (Indian Appeals.)	Moo. Ind. App.	E. F. Moore.
Privy Council, (Admiralty Appeals.)	Lush.	Lushington.
	De G. M. & G.	De Gex, Macnaughten & Gordon.
Chancery,	De G. F. & J.	De Gex, Fisher and Jones.
	De G. & J.	De Gex and Jones.
Divorce & Matrimonial,	S. & T.	Swabey and Tristram.
Bankruptcy,	De G. M. & G.	De Gex, Macnaughten & Gordon.
	De G. & J.	De Gex and Jones.
Exchequer Chamber, Crown cases reserved,	C. & L. C. C.	Cave and Leigh.
	Cox, C. C.	Cox.
Registration Election Appeals,	K. & G.	Keane and Grant.
COMMON LAW.		
Queen's Bench,	El. & El.	Ellis and Ellis.
	El. B. & El.	Ellis, Blackburn and Ellis.
	El. & Bl.	Ellis and Blackburn.
	El. B. & S.	Ellis, Blackburn and Smith.
	B. & S.	Best and Smith.
	D. & M.	Davison and Merrivale.
	Q. B.	Adolphus and Ellis, New Series.
	G. & D.	Gale and Davison.
	Har. & W.	Harrison and Wollaston.
	N. & M.	Nevile and Manning.
	N. & P.	Nevile and Perry.
	P. & D.	Perry and Davis.
	W. W. & H.	Willmore, Wollaston and Hodges.
Common Pleas,	C. B.	Manning, Granger and Scott.
	C. B. N. S.	Scott.
	M. & Sc.	Moore and Scott.
	Marsh.	Marshall.
Exchequer,	H. & C.	Hurlestone and Coltman.
	H. & N.	Hurlestone and Norman.
	Exch Rep.	Welsby, Hurlestone and Gordon.
	M. & W.	Meeson and Welsby.
	M'Clel. & Y.	M'Cleland and Younge.
	Tyr. & Gr.	Tyrwhit and Granger.
	Y. & C. Ex.	Younge and Collyer.
	C. & J.	Crompton and Jervis.
	Youn.	Younge.

COURTS.	ABBREVIATIONS.	REPORTERS.
EQUITY.		
Chancery, generally,	Cr. & Ph.	Craig and Phillips.
	Coll.	Collyer.
	Coop.	Cooper.
	Dick.	Dickens.
	Hall & T.	Hall and Twells.
	Jac. & W.	Jacobs and Walker.
	Myl. & K.	Myln and Keen.
	Myl. & Cr.	Mylne and Craig.
	Mac. & Gord.	Macnaughten and Gordon.
	Tur. & Russ.	Turner and Russell.
	Y. & C. Ch.	Younge and Collyer.
	V. Johns.	H. R. Vaughan Johnson.
Lord Chancellor's Court } Lords Justices Court,	De G. M. & G.	De Gex, Macnaughten & Gordon,
	De G. & J.	De Gex and Jones.
	De G. F. & J.	De Gex, Fisher and Jones.
	De G. J. & S.	De Gex, Jones and Smith.
Rolls Court,	Beav.	Beavan.
Vice Chancellor's Court,	Hare,	Hare.
V. C. Kinderley's Court,	Drew. & Sm.	Drewry and Small.
V. C. Wood's Court,	Hem. & M.	Hemming and Miller.
	J. & H.	Johnson and Hemming.
	K. & J.	Kay and Johnson.
	Kay,	Kay.
	John.	Johnson.
V. C. Stuart's Court,	Giff.	Giffard.
	Sm. & G.	Small and Giffard.
OTHER COURTS.		
Divorce & Matrimonial,	S. & T.	Swabey and Tristram.
Probate Court,	S. & T.	Swabey and Tristram.
Admiralty,	Lush.	Lushington.
	Rob. Adm.	Dr. Robinson's Reports.
	Dods. Adm.	Dodson.
	Swa.	Swabey.
Nisi Prius, Circuits, and Chambers,	F. & F.	Foster and Finlason.
	C. & Kir.	Carrington and Kirwin.
	C. & Marsh.	Carrington and Marshman.
All the Courts,	Jur. N. S.	Jurist, (New Series.)
	W. R.	Weekly Reporter.
	L. T. N. S.	Law Times, (New Series.)
	L. M. & P.	Lowndes, Maxwell and Pollard, (Practice Cases.)
Common Law, Equity, Matrimonial, Admiralty and Probate,	L. J. N. S.	Law Journal, (New Series.)
Ecclesiastical,	Dea.&Sw.Ecc.R.	Deane and Swabey.
	Hag.	Haggard.
Registration Elections,	Knapp & O.	Knapp and Ombler.
	Per. & K.	Perry and Knapp.
Bail Court Cases,	L. & M.	Lowndes and Maxwell.
Common Cases reserved,	Dear. & B.	Dearsley and Bell.
	Den.	Denison.
	Lew. C. C.	Lewin.
	P. & D.	Pearce and Dearsley.

COURTS.	ABBREVIATIONS.	REPORTERS.
Bankruptcy,	Mont. & Ayr.	Montague and Ayrton.
	Mont. & B.	Montague and Bligh.
	Mont. D. & D.	Montague, Deane and De Gex.
	Mont. & M'Ar.	Montague and M'Arthur.
	Dea. & Ch.	Deacon and Chitty.

IN THE IRISH COURTS.

COMMON LAW.

Queen's Bench,	Jebb & B.	Jebb and Bourke.
	Jebb & Sy.	Jebb and Symes.
	Fox & Sm.	Fox and Smith.
	Cooke & Alc.	Cooke and Alcock.
	Batty,	Batty.
	Alc. & Nap.	Alcock and Napier.
Exchequer,	Jones,	Jones.
	Long & T.	Longfield and Townsend.
	Hayes,	Hayes.
	Hayes & Jon.	Hayes and Jones.

EQUITY.

Chancery,	Jones & Lat.	Jones and Latouche.
	Drury,	Drury.
	Dr. & War.	Drury and Warren.
	Ball & Beat.	Ball and Beattie.
	Moll.	Molloy.
	Sch. & Lef.	Schoales and Lefroy.
	Lloyd & G.	Lloyd and Gould.

INDEX TO EQUITY RULES AND STATUTES.

Note.—Where *italics* are used, it denotes that the Rule, &c. referred to, would seem to have been expressly or impliedly rescinded or become obsolete.

NOTE.—Most of the later decisions and references set out in the notes to the several Sections of the Act 17 Vic. c. 18, have been taken from *Morgan's Chancery Act and Orders*, or *Seton on Decrees*, 3rd Ed.

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ERRATA.—P. 159, line 4 from bottom, for "Common" read "Crown."