

Legislative Council.

42^o VICTORIA, 1879.

A BILL

To consolidate and amend the Law respecting the Procedure and Practice of the Supreme Court in its Equitable and Ecclesiastical Jurisdiction and in matters of Lunacy and Infancy.

[MR. DARLEY;—3 April, 1879.]

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows :—

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Jurisdiction of the Judge in Equity.

1. It shall be lawful for the Governor with the advice of the Executive Council to appoint one of the Judges of the Supreme Court to exercise the jurisdiction of the said Court in Equity and the granting of probates of wills and letters of administration and the collection of probates of wills and letters of administration and the collection and administration of the estates of deceased persons and in matters relating to lunacy and infancy. And the Supreme Court shall be holden by the Judge so appointed for the determination of all proceedings in Equity and all such other matters and the disposal of motions and matters in relation thereto respectively and every decree or order of such Judge made in Equity or in any such other matter (unless appealed from in manner hereafter provided) shall be as valid and binding as if made by the full Court.

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Judge's absence or illness.

2. In case of the absence from Sydney or illness of the Judge so appointed it shall be lawful for any of the other Judges (during such absence or illness) to sit alone and determine all such matters as aforesaid in like manner as the Judge so being ill or absent might have done but subject nevertheless to the like appeal. 5

The word "Court."

3. Wherever in this Act the word "Court" is used it shall be taken to mean the Court holden before the Judge so appointed as aforesaid or the Judge acting under the last preceding section in his stead unless the context shall require a different construction.

Power to decide legal titles &c.

4. In any suit or proceeding in Equity wherein it may be necessary to establish any legal title or right as a foundation for relief the Court shall itself determine such title or right without requiring the parties to proceed at law to establish the same and whenever any question now cognizable only at law shall arise in the course of any proceeding before him the Judge shall have cognizance thereof as completely as if the same had arisen in a Court of Law and shall exercise in relation to such title right or question all the powers of the Supreme Court in its Common Law Jurisdiction and no suit in Equity shall be open to objection on the ground that the remedy or appropriate remedy is in some other jurisdiction. 10 15 20

Judge or Judges assisting.

5. In any cause or matter the Judge in Equity may sit with the assistance of any other Judge or Judges of the Supreme Court Provided always that in every such case where *three* Judges sit the decision of the majority shall be taken to be that of the full Court and that were *two* Judges only sit who differ in opinion the cause or matter shall be reheard with the assistance of a *third* Judge. 25

Duties of the Primary Judge in Equity.

6. From and after the passing of this Act it shall not be lawful for the Judge to exercise any jurisdiction at the Common Law side of Supreme Court Provided that it shall lawful for the Governor with the advice of the Executive Council from time to time to authorize and direct such Judge to preside at and exercise Common Law jurisdiction in any Circuit Court in the Colony And provided also that in case of the absence from Sydney of all the other Judges of the Supreme Court it shall be lawful for the said Judge to exercise Common Law jurisdiction in the like manner as any one of the other Judges might have done had he been present in Sydney. 30 35

Plaint.

Form of initiatory pleading.

7. After the commencement of this Act all persons seeking equitable relief shall instead of proceeding by bill of complaint file in the office of the Master in Equity a statement of his case to be termed the *Plaint* which shall contain as concisely as may be a narrative of the material facts and circumstances on which the plaintiff relies such narrative being divided into paragraphs numbered consecutively and each paragraph containing as nearly as may be a separate and distinct statement or allegation and shall pray specifically for the relief which the plaintiff may consider himself entitled to and also for general relief. 40 45

Parties.

Rules as to parties.

8. It shall not be competent to any defendant to take any objection for want of parties in any case to which the rules next hereinafter set forth extend and such rules shall be taken as part of the law and practice of the Court and any law or practice inconsistent therewith is hereby annulled. 50

Rule 1. Any legatee devisee or next of kin may without serving the remaining legatees devisees or next of kin have a decree for the administration of the real and personal estate of a deceased person. 55

Rule

- 5 *Rule 2.* Any one of several *cestui que* trust under any deed or instrument may without serving any other of such *cestui que* trust have a decree for the execution of the trusts of the deed or instrument.
- 10 *Rule 3.* In all cases of suits for the protection of property pending litigation and in all cases in the nature of waste one person may sue on behalf of himself and of all persons having the same interest.
- 15 *Rule 4.* Any executor administrator or trustee may obtain a decree against any one legatee next of kin or *cestui que* for the administration of the estate or the execution of the trusts.
- 20 *Rule 5.* In all the above cases the Court if it shall see fit may require any other person or persons to be made a party or parties to the suit and may if it shall see fit give the conduct of the suit to such person as it may deem proper and may make such order in any particular case as it 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.
- 25 *Rule 6.* In all the above cases the persons who according to the present practice of the Court would be necessary parties to the suit shall be served with notice of the decree 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 the proceedings under the decree and any party so served may within such time as shall in that behalf be prescribed by the general order of the Supreme Court apply to the Court to add to the decree.
- 30 *Rule 7.* In all suits concerning real or personal estate which is vested in trustees 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 or administrators in suits concerning personal estate represent the persons beneficially interested in such
- 35 personal estate and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit but the Court may upon consideration of the matter on the hearing if it shall so think fit order such
- 40 persons or any of them to be made parties.
- 45 9. If in any suit or proceeding in Equity it shall appear to the Court that any deceased person who was interested in the matters in question has no legal personal representative it shall be lawful for the Court either to proceed without any person representing the estate of such deceased person or to appoint some person to represent such estate for the purposes of the suit or proceeding on such notice (if any) as the Court shall think fit either specially or generally by public advertisement and every order made in reference to the matter and every order consequent thereon shall bind the estate of such deceased
- 50 person in the same manner as if there had been a duly constituted legal personal representative of such deceased person and such representative had been a party to the suit or proceeding and had appeared and submitted his rights and interests to the protection of the Court.
- 55 10. No suit shall be dismissed by reason only of the misjoinder of persons as plaintiffs but wherever it shall appear to the Court that notwithstanding the conflict of interest in the co-plaintiffs or the want of interest in some of the plaintiffs or the existence of some ground of defence affecting some or one of the plaintiffs the plaintiffs or some or one of them are or is entitled to relief the Court may

Absence of personal representatives.

Misjoinder of plaintiffs.

may grant such relief and modify its decree according to the special circumstances and for that purpose may direct such amendments if any as may be necessary and at the hearing before such amendments are made may treat any one or more of the plaintiffs as if he or they was or were a defendant or defendants in the suit and the other plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record and where there is a misjoinder of plaintiffs and the plaintiff having an interest has died leaving a plaintiff on the record without an interest the Court may at the hearing order the cause to stand revived as may appear just and proceed to the decision of the cause if it shall see fit and may give such directions as to costs or otherwise as to the Court shall seem meet. 5 10

Absence of persons interested.

11. It shall be lawful for the Court to adjudicate on questions arising between parties notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen or that the property is comprised with other property in the same instrument without making the other parties interested in the property or interested under the same instrument parties to the suit and without requiring the whole trusts and purposes of the instrument to be executed under the direction of the Court 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. Provided always that if the Court shall be of opinion that the application is fraudulent or collusive or for some other reason ought not to be entertained it may refuse to make the order prayed. 15 20 25

Defendant not interested as to all the relief.

12. It shall not be necessary that every defendant to the plaint shall be interested as to all the relief thereby prayed for but the Court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in such suit in which he may have no interest. 30

As to next friend, &c.

13. Before the name of any person shall be used in any suit as next friend of any infant married women or other party or as relator in any information such person shall sign a written authority to the solicitor for that purpose and such authority shall be filed with the plaint. 35

Service of Plaint.

Service of plaint.

14. No writ of subpcena or other process to appear to and answer any plaint shall be required but the defendant shall be served with a written copy of such plaint according to the practice now in force respecting the service of bills of complaint together with an endorsement thereon in the form or to the effect set out in the First Schedule to this Act with such variations as circumstances may require stamped with a proper stamp by one of the Clerks of the Supreme Court. 40

Effect of filing plaint.

15. The filing of a plaint shall have the same effect as the filing of a bill of complaint now has and the service upon the defendant of a written copy of such plaint shall have the same effect as the service of a bill of complaint now has. 45

Substituted Service.

Plaintiff unable to effect personal service.

16. Whenever it shall be made appear to the Court that the plaintiff is from any cause unable to effect prompt personal service the Judge may make such order for substituted or other service or for the substitution of notice for service as may seem just. 50

Service out of the jurisdiction.

17. Whenever it appears fit to the Judge in a case in which the cause of action has arisen within the jurisdiction or is properly cognizable against a defendant within the jurisdiction that any person out of the jurisdiction should be served with the writ or other process of the Court 55

Court the Judge may order such service or such notice in lieu of service to be made or given in such manner and on such terms as may seem just.

Copies of Plaintiff.

5 18. The plaintiff in any suit in Equity instituted after the commencement of this Act shall deliver to the defendant or his solicitor upon application for the same such a number of copies of the plaintiff as he shall require upon being paid for the same at such rate as shall be prescribed by any general rule. Delivering copies of plaintiff.

10 *Amendment of Plaintiff.*

19. Upon the amendment of any plaintiff the provisions hereinbefore contained with respect to filing and serving and delivering copies thereof shall so far as may be extend to the plaintiff as amended. Provided that were according to the present practice of the Court an amendment of a bill may be made without a new engrossment thereof or under such other circumstances as shall be prescribed by any general rule a plaintiff may be amended by written alterations therein as filed. Proceedings upon amendment.

Decree in Cases not Disputed.

20. If the defendant does not dispute that the plaintiff is entitled to the relief prayed by his plaintiff he may appear either personally or by counsel before the Judge sitting in Chambers as hereinafter provided at the time fixed by the endorsement on the plaintiff and may then or at a future day to be appointed by the Judge submit to a decree or order as prayed or with such modification and variation as the Judge may direct and for that purpose the statements of fact in the plaintiff shall unless contradicted be taken to be true and the defendant may give such evidence as he may be advised and the Judge may call for such further proof either orally or by affidavit as he may think proper. Provided that the Judge may if he thinks fit refuse to make any decree thereon and may make such order with respect to the further prosecution of the suit and the costs as the circumstances of the case may require. Proceedings where defendant does not dispute plaintiff's claim.

Appearance in Defence.

21. If the defendant does not admit that the plaintiff is entitled to the relief prayed he shall when he enters an appearance to the plaintiff or at such later period as the Judge shall allow file a memorandum to the effect that he disputes the plaintiff's claim and shall within the time limited by a general rule in that behalf file in the office of the Master in Equity a demurrer plea or answer to the plaintiff but after that time no defendant shall put in a demurrer plea or answer without leave of the Judge. Provided that the power of the Court to grant further time for demurring pleading or answering upon the application of any defendant shall remain in full force and that where the Judge shall grant further time to any defendant for demurring pleading or answering the plaintiff's right to move for a decree under the provisions hereinafter contained shall in the meantime be suspended. Proceedings in reference to defence.

Interrogatories and Answer.

22. No interrogatories shall hereafter be filed for the examination of any defendant except by leave of the Court but every answer shall as heretofore be verified upon oath. Interrogatories to examine defendant abolished but answer to be upon oath.

23. The answer of a defendant whether upon oath or not shall contain an admission or denial of every matter of fact alleged in the plaintiff together with such statements as the defendant may think it necessary. Form of answers.

necessary or advisable to set forth and shall be divided into paragraphs numbered consecutively each paragraph containing as nearly as may be a separate and distinct statement.

Counter-claims by defendant.

24. A defendant may in his answer set off or set up by way of counter-claim against the claims of the plaintiff any right or claim and such set-off or counter-claim shall have the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in the same suit both on the original and on the cross claim. But the Court may on the application of the plaintiff before trial if in the opinion of the Judge such set-off or counter-claim cannot be conveniently disposed of in the pending suit or ought not to be allowed refuse permission to the defendant to avail himself thereof. 5

Court may decree in favor of defendant.

25. Where in any suit a set-off or counter-claim is made available as a defence against the plaintiff's claim the Court may if the balance is in favour of the defendant make a decree in favour of the defendant for such balance or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case. 15

Defendant's Interrogatories.

Discovery at instance of a defendant.

26. Any defendant (but where he has been required to answer interrogatories not until after he shall have put in a sufficient answer thereto) may in like manner by leave of the Court file interrogatories for the examination of the plaintiff to which interrogatories shall be prefixed a concise statement of the subjects on which a discovery is sought and he shall deliver a copy of such interrogatories to the plaintiff or his solicitor and such plaintiff shall on oath answer such interrogatories and the practice with reference to excepting to answers for insufficiency or for scandal shall extend to answers put in to such interrogatories. Provided that in determining the materiality or relevancy of any such answer or of any exception thereto the Court shall have regard to the statements contained in the plaint and in the answer thereto by the defendant exhibiting such interrogatories. Provided also that a defendant if he shall think fit may instead of filing interrogatories for the examination of the plaintiff institute against him a suit for the purpose of discovery. 25 30

Exceptions.

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Exceptions for insufficiency or impertinence.

27. Except in the case of answers to interrogatories the practice of excepting to answers for insufficiency and to plaints answers and other proceedings for impertinence is hereby abolished. Provided that the Court may direct the costs occasioned by any impertinent matter introduced into any proceeding to be paid by the party introducing the same. 40

Production of Documents.

Production of documents by a defendant.

28. The Court may on the application of the plaintiff in any suit make an order for the production by any defendant on oath of such documents in his possession or power relating to any matter in question in the suit as the Court shall think right and the Master in Equity shall have the like power under references to him and the Court or Master (as the case may be) may deal with such documents when produced in such manner as shall appear just. 45

The like by plaintiffs.

29. The Court may on the application of any defendant (but where he has been required to answer interrogatories not until after he has put in a sufficient answer thereto) make an order for the production by the plaintiff on oath of such documents in his possession or power relating to any matter in question in the suit as the Court shall 50

shall think right and the Master in Equity shall have the like power under references to him and the Court or Master (as the case may be) may deal with such documents when produced in such manner as shall appear just.

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Want of Prosecution.

30. Every defendant may move to dismiss the suit for want of Dismissal of suits. prosecution at such times and under such circumstances and subject to such restrictions as shall be in that behalf prescribed by any general rule.

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Motion for Decree.

31. The plaintiff in any suit may at any time after the time Proceedings on motion for a decree. allowed the defendant for answering has expired but before replication move the Court upon such notice as shall be prescribed by a general rule for such decree or decretal order as he may think 15 himself entitled to and the plaintiff and defendant respectively may file affidavits in support of and in opposition to the motion so to be made and use the same on the hearing of such motion and if such motion be made after an answer to interrogatories filed in the cause such answer shall for the purposes of the motion be treated as an 20 affidavit.

32. Upon any such motion it shall be discretionary with the Making of such decree discretionary. Court to grant or refuse the same and to give such directions with respect to the further prosecution of the suit as the circumstances appear to require and the Court may make such order as to costs as it 25 may think right.

Issue.

33. In suits where notice of motion for a decree or decretal Filing replication. order shall not have been given or having been given where a decree or decretal order shall not have been made thereon issue shall be joined 30 by filing a replication in the form or to the effect of the replication now in use in the Court.

Mode of Trial of Cause.

34. The present mode of taking evidence before the Master to Evidence in contested causes to be taken orally. be used at the hearing of the cause after issue joined is hereby 35 abolished and such evidence shall hereafter be taken by the oral examination of witnesses and other proofs before the Judge in open Court and the evidence may if the Judge so direct be taken down by a shorthand writer and the Judge shall have the same power of 40 issuing or of authorizing the issue of subpoenas to persons whose attendance may be required at such hearing or on any trial under the next succeeding sections and of punishing parties for non-attendance in obedience to any such subpoena as is now vested in the Supreme Court in its Common Law Jurisdiction.

35. In all cases in which the Court in Equity has jurisdiction Power to Court to award damages in certain cases. 45 to entertain an application for an injunction against a breach of any covenant contract or agreement or against the commission or continuance of any wrongful act it shall be lawful for the Court if it shall think fit to award damages to the party injured either in addition to or in substitution for such injunction a specific performance and 50 such damages may be assessed in such manner as the Court shall direct.

36. It shall be lawful for the Court if it shall think fit to cause Damages may be assessed or question of fact arising in any suit may be tried by a jury before the Court itself. the amount of such damages in any case to be assessed or any question of fact arising in any suit or proceeding to be tried by a special or common jury before the Court itself.

37.

Question ordered to be tried by jury to be reduced into writing.

37. Any question of fact and any question as to the amount of damages which shall be so ordered to be tried by a jury before the Court itself shall be reduced into writing in such form as the Court shall direct and at the trial the jury shall be sworn to try the said question and a true verdict to give thereon according to the evidence and upon every such trial the Court shall have the same powers jurisdiction and authority as belongs to any Judge of the Supreme Court sitting at *nisi prius*. 5

Judge may procure attendance of jury.

38. The Judge may issue such precepts and make such orders upon the Sheriff for procuring the attendance of a special or common jury for the trial of any such question of fact or question of damages as may be made by the Supreme Court and may also make any other orders in relation thereto which to him may seem requisite and every such jury shall be summoned struck and called in like manner as if summoned for the trial of a cause in the Supreme Court in its Common Law jurisdiction and generally for all purposes of or auxiliary to the trial of questions by a jury and in respect of new trials the Judge shall have the same jurisdiction in all respects as belongs respectively to the Supreme Court in its Common Law jurisdiction or to any Judge thereof for the like purpose Provided that from every order made by the Judge on an application for a new trial there shall be the same right of appeal as from any other order of the Court. 10 15 20

Damages may be assessed on questions of fact tried before the Court itself without a jury.

39. It shall be lawful for the Court to cause the amount of such damages in any case to be assessed on any question of fact arising in any suit or proceeding to be tried before the Court itself without a jury and to cause the evidence on the trial of that question to be taken by the oral examination of witnesses and other proofs in open Court and any question of fact and any question as to the amount of damages which shall be so ordered to be tried before the Court itself shall be reduced into writing in such form as the Court shall direct and the verdict of the Judge shall be of the same effect as the verdict of a jury under this Act and the proceedings upon and after such trial as to the power of the Court the evidence and otherwise shall be the same as in the case of a trial by jury under this Act Provided that in the case of a trial under this section any person may apply for a new trial either to the Judge before whom the trial was heard or by way of appeal to the full Court. 25 30 35

Damages may be assessed by a jury before any Judge of the Supreme Court at *nisi prius* or on circuit.

40. It shall be lawful for the Court in any case where it shall see fit to cause any such question of fact to be tried or the amount of such damages to be assessed by a jury before any Judge of the Supreme Court at *nisi prius* or on circuit. 40

Proceeding to hearing after evidence closed.

41. When the evidence on both sides is closed and there has been no trial before a jury a memorandum to that effect shall be signed by the Judge and filed and the plaintiff may thereupon forthwith proceed to the hearing of the cause unless the Judge shall otherwise order And the plaintiff shall without any such memorandum after the verdict in cases of trial before a jury proceed to the hearing on a day to be fixed by the Judge for that purpose and it shall not be necessary in any case to sue out a subpoena to hear judgment. 45

Evidence.

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Evidence at the hearing.

42. The evidence to be used at the hearing shall be taken in the same manner and be subject to the same rules and exceptions as at a trial at *nisi prius* Provided that affidavits by particular witnesses or as to particular facts may by consent or by leave of the Court be used on the hearing and such consent may if the Court shall think fit be given by or on the part of married women or infants or other persons under disability. 55

43.

43. The Court at the hearing of any cause or of any further directions therein may receive proof by affidavit of all proper parties being before the Court and of all matters necessary to be proved for enabling the Court to order payment of any money belonging to a married woman and of all such other matters not directly in issue in the cause as in the opinion of the Court may properly be so proved.

Affidavits.

44. Every witness who has made an affidavit in any cause or matter before the Court shall be subject to oral cross-examination in the same manner as if the evidence given in his affidavit had been given by him orally and may be re-examined orally by the party using such affidavit and such witness shall attend before the Court to be so examined upon receiving due notice and payment of his reasonable expenses in like manner as if he had been duly served with a writ of subpoena *ad testificandum* and the expenses attending such examination shall be paid by the parties respectively in like manner as if the witness were the witness of the party cross-examining and shall be deemed costs in the cause unless the Court shall otherwise direct.

Cross-examination of a deponent.

45. In any case in which all the parties are competent to make admissions any party may call on any other party by notice to admit any document saving all just exceptions and in case of his not admitting the same the cost of proving the document shall be paid by the party so omitting whatever the result of the cause unless the Court shall otherwise order and no costs of proving any document shall be allowed unless such notice has been given except where the omission to give it was in the opinion of the Master a saving of expense.

Notice to admit documents.

46. In every case where the Court shall deem it expedient so to do the Court may grant a commission or make an order at any stage of the cause for the examination of witnesses either orally or upon interrogatories as the Court shall think fit and before such person or officer of the Court as it shall for that purpose appoint and every such examination being duly taken and returned may be read as evidence at the trial or hearing accordingly Provided that it shall not be necessary to sue out any Commission for the examination of any witness within the jurisdiction of the Court and every officer or person appointed to examine any such witness by order of the Court shall have the power of administering oaths and also such other powers as by the order appointing him may be directed.

Examining witnesses *de bene esse*.

47. All pleadings examinations and affidavits in causes or matters in Equity may be sworn and taken in any place out of this Colony under the dominion of Her Majesty before any Judge Notary Public or person authorized to administer oaths at such place or before any British Consul or Vice-Consul in any place out of Her Majesty's dominions And judicial notice shall be taken of the seal or signature as the case may be and authority of any such Judge Notary Public person Consul or Vice-Consul.

Pleadings &c. out of the jurisdiction.

48. The Judge may in every case obtain the assistance of conveyancing counsel accountants merchants engineers actuaries or other scientific persons the better to enable him to determine any matter at issue in any cause or proceeding and to act upon the certificate of any such person The allowance in respect of fees to such persons shall be regulated by the Master subject to an appeal to the Judge.

Assistance of scientific persons.

49. Any party in any cause or matter may by a subpoena *ad testificandum* require the attendance of any witness before the Court or Master or any person specially appointed for the purpose and examine such witness orally for the purpose of using his evidence upon any motion petition or other proceeding in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause.

Oral evidence on motions &c.

Answer how used on
certain motions.

50. Upon application by motion or petition to the Court in any suit depending therein for an injunction or a receiver or to dissolve an injunction or discharge an order appointing a receiver where the defendant has filed an answer to interrogatories such answer shall for the purpose of evidence on such motion or petition be regarded as an affidavit and affidavits may be received and read in opposition thereto. 5

Evidence after the
hearing.

51. In cases where it shall be necessary for any party to go into evidence subsequently to the hearing or on any inquiry account or reference before the Judge or Master such evidence shall be taken in such manner as shall be prescribed by any general rule of the Court. 10

Declaratory Decree.

Declarations of right.

52. No suit shall be open to objection on the ground that a merely declaratory decree is sought thereby and the Court may make binding declarations of right without granting consequential relief.

Formal Defects or Irregularities.

Formal defects not
to invalidate
proceedings.

53. No proceeding shall be invalidated by any formal defect or by any irregularity unless the Court shall be of opinion that substantial injustice has been caused by such defect or irregularity and that such injustice cannot be remedied by any order of the Court. 15

Sale of Mortgaged Property.

Court may direct a
sale in foreclosure
suits.

54. In any suit for the foreclosure of the equity of redemption in any property the Court may upon the request of the mortgagee or any subsequent incumbrancer or of the mortgagor or any person claiming under them respectively direct a sale of such property instead of a foreclosure on such terms as the Court may think fit and without previously determining the priorities of incumbrances or giving time to redeem provided that if such request be made by any such subsequent incumbrancer or by the mortgagor or any person claiming under them respectively the Court shall not direct any such sale without the consent of the mortgagee or the person claiming under him unless the party making such request shall deposit in Court a reasonable sum to be fixed by the Court for the purpose of securing the performance of such terms as the Court may think fit to impose on him. 20

Account.

Dispensing with
references in certain
cases of account.

55. In all cases of account either party may by consent or by leave of the Judge file a State of Facts before or at the hearing of any cause petition motion or matter verified by affidavit and where the amount is capable of being ascertained without difficulty from the pleadings or evidence or by such State of Facts the Court may adjust the same and decree accordingly without further inquiry or reference and where the account cannot be so adjusted may give such special directions as may seem expedient with respect to the mode in which the account shall be taken or verified which directions may be given either by the decree or order directing such account or by any subsequent order and where it shall think fit so to do the Court may direct that in taking the account the books in which it has been kept or any of them shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objections thereto as they may be advised. 35 40 45

Sale of Real Estate.

Sales may be directed
before decree.

56. If in any suit instituted in relation to real estate it shall appear to the Court that it will be expedient that the same or any part thereof should be sold for the purposes of such suit the Court may 50

may at any time direct the same to be sold and such sale shall be as valid as if directed to be made by a decree or decretal order on the hearing and any party to the suit in possession of such estate or in receipt of the rents and profits thereof shall deliver up such possession or receipt to the purchaser or such other person as the Court shall direct.

Application of Income.

57. Where any real or personal property is the subject of any proceeding in Equity and the Court is satisfied that the same will be more than sufficient to answer all the claims thereon which ought to be provided for in such proceeding the Court may at any time after the commencement of such proceeding allow to the parties interested therein or any of them the whole or part of the annual income of such real property or a part of such personal property or of the income thereof up to such time as the said Court shall direct and for that purpose may make such orders as may appear expedient.

Allowance to parties out of property in certain cases.

Injunction.

58. The practice of the Court with respect to injunctions for the stay of proceedings at law shall so far as the nature of the case will admit be assimilated to the practice of the Court with respect to special injunctions generally and such injunctions may be granted upon interlocutory applications supported by affidavit in like manner as in the case of other special injunctions.

Injunctions to stay proceedings at law.

59. An injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made and whether there be a prayer for an injunction or receiver or not and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just and if an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass such injunction may be granted if the Court shall think fit whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title and whether the estates claimed by both or by either of the parties are legal or equitable.

Injunctions and receivers.

60. No writ of injunction shall hereafter be issued or any docquet be signed or filed as at present but service upon any person of the decree or order directing such injunction or notice thereof shall have the same effect as the issuing of a writ of injunction and signing and filing of a docquet and service of the writ upon such person and thereupon the plaintiff shall be entitled to all such remedies as he is entitled to under the present practice.

No writ to be issued.

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Abatement of Suit.

61. Upon any suit becoming abated by death marriage or otherwise or defective by reason of some change or transmission of interest or liability it shall not be necessary to file any new or supplemental plaint in order to obtain the usual order to revive such suit or the usual decree or order to carry on the proceedings but an order to the effect of the usual order to revive or of the usual supplemental decree may be obtained as of course upon an allegation of the abatement of such suit or of the same having become defective and of the change or transmission of interest or liability and an order so obtained when served upon the party or parties who according

Simplifying proceedings for reviving a suit.

according to the present practice would be defendant or defendants to a bill of revivor or supplemental bill shall from the time of service be binding on such party or parties in the same manner as if such order had been regularly obtained according to the existing practice and such party or parties shall thenceforth become a party or parties to the suit and be bound to enter an appearance thereto as if he or they had been duly served with process to appear to such a bill duly filed against him. Provided that the party or parties so served may within such time after service as shall be prescribed by any general rule in that behalf apply to the Court to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill stating the previous proceedings in the suit and the alleged change or transmission of interest or liability and praying the usual relief consequent thereon. Provided also that if any party so served is under disability other than coverture such order shall be of no effect as against such party until a guardian *ad litem* shall have been appointed for such party and such time shall have elapsed thereafter as shall be prescribed by any general rule.

Supplemental Statements.

Facts newly arising—
how introduced.

62. It shall not be necessary to file any supplemental plaint for the purpose only of stating facts which have occurred after the institution of the suit but such facts may be introduced by way of amendment into the original plaint if the cause is otherwise in a state to allow of an amendment in the plaint and if not the plaintiff may state such facts on the record in such manner and subject to such rules with respect to the proof thereof and affording the defendant an opportunity of answering the same as shall be prescribed by any general rule in that behalf.

Judge Sitting in Chambers.

General power to sit
in Chambers.

63. After the commencement of this Act the Judge in Equity shall sit in Chambers for the dispatch of such business in Equity as in his opinion may advantageously and with propriety be heard in Chambers and such Judge shall fix the times for so sitting and when so sitting shall have the same powers and jurisdiction as in open Court.

Particular business
to be heard there.

64. The business to be disposed of by the Judge in Chambers shall consist of such of the following as he shall think would be more conveniently so disposed of namely—Applications for time for leave to amend for production of documents for determining the mode of trial and settling the questions to be tried applications relating to the conduct of any suit or matter the guardianship or maintenance of infants matters connected with the management of property and such other matters as the Judge may from time to time see fit so to dispose of.

Adjournment from
Court to Chambers.

65. The Judge while sitting in open Court may adjourn for hearing in Chambers or while sitting in Chambers may adjourn for hearing in open Court any case before him which he may think would better be heard in Chambers or in open Court as the case may be.

Procedure in Cham-
bers.

66. The course of proceeding in Chambers shall be by summons and as nearly as may be according to the forms observed by Judges of the Supreme Court sitting in Chambers in proceedings at law.

Decrees of Judge.

50

Mode of settling
decrees.

67. The decrees and orders of the Judge in Equity whether sitting in open Court or in Chambers may be settled by the Judge or he may direct any such decree or order to be settled by the Master in Equity and the Judge shall in every case certify his approval thereof under his hand. And no warrant shall be taken out to consider any decree

decree or order but the Judge or Master shall at the time of settling the decree or order direct what proceedings shall be taken thereunder and the Judge shall direct what inquiries and proceedings shall be taken before himself under the decree or order and what before the
5 Master.

Proceedings before the Master.

68. The Judge in Equity or the full Court in cases under Appeal shall have the sole power to order what matters shall be investigated before the Master in Equity with or without special direction and what
10 matters shall be heard and investigated by themselves respectively and in every case unless the Judge or such Court shall otherwise direct the Master shall tax costs and make such inquiries as have usually been prosecuted before the Master And the Judge shall give such aid and directions in any such inquiry as he may think fit subject to the right
15 of appeal and to the right of every suitor to bring any particular point before the Judge himself.

What matters in-
quirable before
Master.

69. The Master in Equity shall for the purpose of any proceeding before him have full power to issue advertisements to summon parties and witnesses to administer oaths to take affidavits and also
20 acknowledgments except those of married women and when directed by the Judge or full Court to examine parties or witnesses orally or upon interrogatories And every party and witness summoned by the Master shall be bound to attend such summons and shall for disobedience thereof be liable to process of contempt in like manner as for
25 disobedience to or for default of attendance in pursuance of any order of the Supreme Court or on any writ of subpœna and all persons knowingly swearing or affirming falsely before the Master shall incur all the penalties of perjury.

Power to summon
witnesses &c.

70. Directions by the Judge concerning any proceedings before the Master shall not require any particular form and the result thereof
30 shall not be embodied in a formal report but shall be stated in a short certificate to the Judge unless he shall otherwise direct And the approval of the Judge of any such certificate or report shall be signified under his hand.

Form of Master's
report.

71. No exception shall lie to any certificate or report of the Master after it has been adopted and signed by the Judge but any party may during the proceeding before the Master or within such time after its conclusion as shall be fixed by any general rule in that
40 matter arising in the course of the proceeding or upon the result of every such certificate and report shall be filed and shall thenceforth be binding on all parties unless discharged or varied by the Court upon application within such time as may be fixed by any general
45 rule Provided that nothing herein shall prejudice the power of the full Court sitting in Equity on Appeal to open any such certificate or report as any report of the Master absolutely confirmed may now be opened.

How and when it
may be reviewed.

Appeals.

72. Any person feeling aggrieved by any decree or order of the Judge in Equity may at any time within *fourteen days* next after the pronouncing of the same or within such further time as the Judge may allow enter an appeal in the office of the Court against such
50 decree or order to the full Court subject to such general rules as shall be in that behalf prescribed and every person so appealing shall within
55 *fourteen days* from the time of filing such appeal deposit in the hands of the Master such sum not exceeding *one hundred pounds* as such
Master

Provision for
appeals to full Court.

Master shall direct or at the option of the person appealing shall deposit with such Master a bond of two persons to be approved of by him in such sum not exceeding *one hundred pounds* as he shall direct conditioned to be void if the appellant shall prosecute his appeal with all due diligence and pay such costs as the Court shall adjudge which said sum of money or bond as the case may be shall be held by the Master subject to the order of the Court. And if such sum of money or bond shall not be deposited as aforesaid within the period hereby provided such appeal shall be deemed to have been abandoned. 5

Mode of appealing.

73. All appeals under this Act shall be by way of re-hearing and shall be brought by notice of motion in a summary way and no petition or other formal proceeding other than such notice of motion shall be necessary. The appellant may by the notice of motion appeal from the whole or any part of any decree or order and the notice of motion shall state whether the whole or part only of such decree or order is complained of and in the latter case shall specify such part. 10 15

Notice of appeal.

74. The notice of appeal shall be served upon all parties directly affected by the appeal and it shall not be necessary to serve parties not so affected but the full Court may direct notice of the appeal to be served on all or any other parties to the suit or upon any person or body corporate not a party and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may seem just and may make such decree or order as might have been made if the persons or bodies corporate served with such notice had been originally parties. Any notice of appeal may be amended at any time as to the full Court may seem fit. 20 25

General powers of the full Court.

75. The full Court shall have all the powers and duties as to amendment and otherwise of the Judge in Equity together with full discretionary power to receive further evidence upon questions of fact such evidence to be either by oral examination in Court by affidavit or by deposition taken before the Master or a Commissioner. Such further evidence may be given without special leave upon interlocutory applications or in any case as to matters which have occurred after the date of the decree or order from which the appeal is brought. Upon appeals from a decree or order upon the merits at the trial or hearing of any cause or matter such further evidence (save as aforesaid) shall be admitted on special grounds only and not without special leave of the Court. The full Court shall have power to make any decree or order which ought to have been made and such further or other order as the case may require. The powers aforesaid shall be exercised by the said Court notwithstanding that the notice of appeal may be that part only of the decision may be reversed or varied and such powers may also be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have appealed from or complained of the decision. The full Court shall have power to make such order as to the whole or any part of the costs of the appeal as may appear just. Provided always that the full Court shall be deemed to be any number of judges thereof not being less than three. 30 35 40 45

Regulations as to cross appeals.

76. It shall not under any circumstances be necessary for a respondent to give notice of motion by way of cross appeal but if a respondent intends upon the hearing of the appeal to contend that the decision of the Court below should be varied or altered he shall within such time as may be prescribed by any general rule or by special order give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers by this Act conferred upon the full Court but may in the discretion of the Court be ground for an adjournment of the appeal or for a special order as to costs. 50 55

77. Every such appeal shall stay the execution of proceedings upon the decree or order appealed from unless the Judge shall direct such execution to be proceeded with. Stay of proceedings on appeal. Provided that the Judge may (subject nevertheless to appeal as from any other order) direct such 5 decree or order to be carried into execution and all proceedings to be taken thereupon as if no appeal had been entered which direction may be upon such terms as to security or otherwise or absolutely without any terms as to such Judge shall seem fit.

78. The decrees and orders of the Supreme Court on appeal 10 shall be settled by the Master as at present and the Court may in any decree or order direct what if any accounts shall be taken or inquiries made before the Judge in Equity and what if any before the Master. Decrees how settled.

79. The Judge may on the application of any party or at his own discretion and on such terms if any as he shall think fit to impose 15 direct a rehearing by the full Court of any cause petition motion or matter before him and in such case it shall not be necessary to give any notice of appeal but nothing herein shall prejudice the right of any party to appeal where the Judge shall not give any such direction. Appeal by direction of the Judge.

80. Nothing in this Act shall be construed to affect the right 20 of any party to appeal to Her Majesty in Council from any such decree or order or from any reversal or affirmance thereof. Appeals to Privy Council.

81. And whereas it is expedient to amend and declare the law as to the matters next hereinafter mentioned Be it enacted as follows:—

- 25 1. In the administration of the assets of any person who may die after the passing of this Act and whose estate may prove to be insufficient for the payment in full of his debts and liabilities the same rules shall prevail and be observed as to 30 the respective rights of secured and unsecured creditors and as to judgments executions alienations and payments void against creditors and as to debts and liabilities provable and as to the valuation of annuities and future or contingent liabilities respectively as may be in force for the time being 35 under the law of insolvency with respect to the estates of persons adjudged insolvent and all persons who in any such case would be entitled to prove for and receive dividends out of the estate of any such deceased person may come in under the decree or order for the administration of such estate and 40 make such claims against the same as they may respectively be entitled to by virtue of this Act.
2. No executor or administrator shall be entitled to any right of 45 retainer or preference over any of the other creditors of such deceased person and any creditor of any such deceased person who within one year next after the death of such deceased person shall have received any payment out of such estate in excess of the ratable dividend to which he would have been 50 entitled if he had proved his debt under such decree or order shall be liable to refund and repay the amount so received in excess for the purpose of equal and ratable distribution amongst the creditors of such deceased person.
3. No claim of a *cestui que* trust against his trustee for any 55 property held on an express trust or in respect of any breach of such trust shall be held to be barred by any Statute of Limitations. Statutes of Limitation inapplicable to express trusts.
4. An estate for life without impeachment of waste shall not 60 confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste unless an intention to confer such right shall expressly appear by the instrument creating such estate.

Liability of estates
for life with general
power of appoint-
ment.

5. Where any real or personal property is vested in or settled upon trust for any person for life with a general power of appointment the same shall be chargeable with the debts and liabilities of such person in the same manner and to the same extent as if such property were vested in or settled upon trust for such person absolutely. 5

Ecclesiastical and Miscellaneous.

Practice in
Ecclesiastical suits.

82. After the commencement of this Act the procedure and practice by this Act provided in respect of suits and proceedings in Equity shall as nearly as circumstances will permit be adopted in and applied to all suits and proceedings in the Ecclesiastical Jurisdiction of the Supreme Court. 10

Duties of Curator &c.

83. The duties of Curator of Intestate Estates and Registrar of the Supreme Court in its Ecclesiastical Jurisdiction are hereby transferred to the Master in Equity and all the powers vested in such Curator or Registrar shall be exercised by the said Master and all moneys and property now in the possession of or vested in the present Curator or Registrar shall be transferred to and vested in the said Master subject to all provisions now in force with respect to the same. 20

Inventory and
accounts.

84. Every person to whom probate or letters of administration shall hereafter be granted shall within *six* calendar months next following file in the office of the Master in Equity a full true and perfect inventory of the goods chattels and credits of the deceased and shall within *fifteen* calendar months after the date of such probate or letters of administration file in the same office a full true and particular account of his administration showing every receipt and payment and the amount and nature of the personal estate if any still outstanding and upon what security the same is invested which account shall be verified by the affidavit of the executor or administrator as the case may be and thereupon the said Master shall cause due notice thereof to be published in the *Government Gazette* and in such newspapers and in such manner as he may think proper and may direct notice to be served personally on any of the parties beneficially interested in such estate And such notice shall state that all parties having any claim on the estate or interested therein may come in before him at his office at or before a time to be fixed in such notice and inspect the said account and may object thereto. 35

Accounts when
objection taken.

85. If any objection be made to the account so filed the Master shall take the account and certify the result thereof in the same manner as if there had been a decree for the administration of the personal estate of the deceased person and every person interested in such estate shall have the same right of appeal as if he had been a party in an administration suit. 40

Passing of accounts.

86. When no objection has been taken within the time fixed for such purpose or when the account has been certified by the Master the Judge in Equity shall pass the account and may make such allowance and commission as he may deem reasonable and may make such order as to the disposal of the balance if any shown by such account as may be necessary. 50

Account when passed
may be pleaded.

87. An executor or administrator who has so passed his account may in any suit in Equity for the administration of the same estate plead such account as a stated and settled account between him and all persons interested in such estate.

Neglect to file inven-
tory and account.

88. Where any executor or administrator shall neglect to file his inventory or account as hereinbefore mentioned the Master shall report the matter to the Judge in Equity who may make such order as may be necessary to compel the defaulting executor or administrator to file his inventory or account or may grant further time for filing the same. 55
89.

89. All suits and proceedings in the Equity or Ecclesiastical Jurisdiction of the Court and in Lunacy and Infancy instituted before the commencement of this Act shall be continued as if this Act had not been passed unless by consent of the parties thereto.

Suits &c. now pending.

5 90. The Judges of the Supreme Court or any three of them may make general rules for regulating the times and form and mode of procedure and generally the practice of the said Court in respect of the several matters to which this Act relates and for fixing the amount of all fees and allowances to officers of the Court and solicitors
10 in reference to such matters and otherwise for the effectual execution of this Act and of the intention and object thereof Provided that the rules of the Supreme Court at present in force in reference to such matters or any of them until repealed or altered by any such general rule shall continue in force.

Power to make rules.

15 91. All rules made under this Act shall immediately after the making thereof be laid before both Houses of Parliament if then sitting or if not within *ten days* after the next sitting thereof and if either of the said Houses shall by any resolution passed within *thirty days* after such rules have been laid before it resolve that any such
20 rule or any part thereof ought not to continue in force then such rule or part shall immediately cease to be binding.

Rules to be laid before Parliament.

92. In the construction of this Act the word "plaint" shall include "information" and the word "affidavit" shall include affirmation statutory declaration and attestation of honor.

Interpretation clause.

25 93. This Act shall commence on the first day of thousand eight hundred and and may be cited as "The Equity and Ecclesiastical Consolidation Act" and after that date the several Acts and parts of Acts specified in the Second Schedule hereto shall be repealed Provided that such repeal shall not have the effect of
30 reviving any practice procedure or penalties which had been abolished by the said Acts or any of them or of invalidating any acts thereby authorized or validated.

ONE Commencement of Act and repeal of sundry Acts.

SCHEDULES.

FIRST SCHEDULE.

Indorsement on Plaintiff.

VICTORIA R.

To the within named defendant A.B. (or where there is more than one defendant 5
 defendants A.B. and C.D.) greeting—We command you (“and every one of you” where
 there is more than one defendant) that within days after the service hereof
 on you exclusive of the day of such service you cause an appearance to be entered for
 you in our Supreme Court in the office of the Master in Equity to the within plaint and
 that if you do not admit that the plaintiff is entitled to the relief within prayed you do 10
 at the same time of entering appearance file in the office of the Master in Equity a
 memorandum to the effect that you dispute the plaintiff’s claim and further that if you do
 admit the plaintiff’s claim you do on the eighth day after such appearance or so soon
 after as you can be heard attend either personally or by counsel before the Judge in
 Equity at the Supreme Court House in King-street in the City of Sydney at ten of 15
 the clock in the forenoon and submit to such decree as is within prayed or as shall be
 just.

Witness the Honorable the Judge in Equity at Sydney the
 day of in the year of our reign.

NOTE.—Appearances are to be entered at the office of the Master in Equity at the 20
 Court House in King-street aforesaid and if you either neglect to enter your
 appearance or to file a memorandum as abovementioned or personally or by
 counsel to attend at the *place and time abovementioned* you will be subject to such
 order as the Court may think fit to make in your absence.

SECOND SCHEDULE.

25

Acts and parts of Acts repealed.

5 William IV No. 8 so far as it adopts the Acts 11 George IV and 1 William IV c. 36.	
4 Victoria No. 22 sections 20 & 21.	
5 Victoria No. 9 sections 12 & 13.	
11 Victoria No. 22 the whole.	
11 Victoria No. 27 the whole.	
13 Victoria No. 31 the whole.	
16 Victoria No. 3 section 19 and subsequent sections to the end.	
16 Victoria No. 13 the whole.	35
17 Victoria No. 7 the whole.	
22 Victoria No. 14 section 6.	
26 Victoria No. 12 section 37.	