

Acts of the General Assembly of Her Majesty's Province of New-Brunswick passed in the year 1863. Fredericton, NB: G. E. Fenety, Printer to the Queen's Most Excellent Majesty, 1863.

26 Victoria – Chapter 16

An Act to amend the Act relating to the administration of Justice in Equity. Passed 20th April, 1863.

| Section. | Section. |
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| 1. Bill in Equity not to be sworn to, except in Injunction cases. | 11. Any decree made for sale of land, the person entitled thereto, and bound by the decree, to be a Trustee. |
| 2. Bills filed for injunction to be sworn to, or facts proved by affidavit. | 12. Provisions of 17 V. c. 18, sub-chapter 4, s. 2, to extend to constructive trusts. |
| 3. Causes set down for hearing on 14 days' notice, without publication of evidence. 17 V. c. 18, s. 16, sub-chapter 2, repealed. | 13. Persons interested in questions cognizable in equity, to state special case for opinion of the Court. |
| 4. Amount claimed to be endorsed on Summons in suits for foreclosure of Mortgages. | 14. Form of special case, and authority of Court thereon. |
| 5. Bill taken <i>pro confesso</i> without notice of motion, if no appearance. | 15. How filed and set down for hearing. |
| 6. Causes heard <i>vice voce</i> after issue joined, on 14 days notice. Power of Judge to postpone hearing. | 16. Parties thereto subject to jurisdiction of the Court. |
| 7. Judge to assess amount due in foreclosure suits, without notice, where Bill taken <i>pro confesso</i> , unless defendant applies for reference. | 17. Court to determine questions raised, and declare opinion, without administering relief. Court may refuse to determine question. |
| 8. Memorial of absolute decree of foreclosure to be registere; certified copy to be evidence. | 18. Executor, &c. protected, when acting in conformity with decree made on a special case. |
| 9. Facts occuring after commencement of suit, to be added to Bill as an amendment. | 19. Costs of special case. |
| 10. Power of Court to order sale of real estate in suits for administration of estates of deceased persons. | 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 Parts of Act 17 V. c. 18, inconsistent herewith, repealed.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. |

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*, as

requires the Bill to be sworn to by the Plaintiff or his Agent, is hereby repealed, except as hereinafter provided.

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.
3. The sixteenth Section 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.
4. In any suit commenced for the foreclosure 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, 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.]”
5. If the defendant in any suit does not appear within one month after the filing of the Bill, 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.
6. When a cause is at issue by filing a replication, 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.
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.
8. A Memorial (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.
9. It shall not be necessary to file any supplemental bill for the purpose only of stating or putting in issue facts or circumstances which may have occurred after the commencement of the suit; 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, and if not, the plaintiff 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.

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 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.

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.

12. The word "trust" in the second Section of sub-Chapter 4 of the above recited Act, shall extend to and include implied and contractive trusts.

13. 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 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 to concur in such case.

14. Every such special case shall be entitled as a cause between the parties interested, or claiming to be interested as plaintiff and defendant, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the question raised thereby; 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.

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.

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; 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.

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.

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.

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.