

Laws of Her Majesty's Province of United Canada, passed in the year 1851. York: Stewart Derbshire and George Desbarts, 1851.

14 & 15 Victoria – Chapter 113

An Act to confirm Decrees and Orders and other proceedings of the Court of Chancery of Upper Canada, in certain cases. 30th August, 1851.

Whereas by a certain Act of the Parliament of that part of this Province heretofore constituting the Province of Upper Canada, intituled, *An Act to establish a Court of Chancery in this Province*, it was amongst other things enacted, That the Vice-Chancellor of the said Court thereby constituted and established, should have full power and authority, from time to time, to settle and declare the form of process and to define the practice and proceedings to be observed in the said Court of Chancery in prosecuting and defending suits therein: And whereas in pursuance of the said authority, the Vice-Chancellor of the said Court made and passed the several Orders, numbered sixty-three, sixty-six, sixty-eight and seventy-five, mentioned and set forth in the Schedule marked A. hereunto annexed, and the Order also mentioned and set forth in the Schedule and numbered one hundred and seventy-eight, was afterwards made and passed by the Chancery Commissioners, and afterwards confirmed by Parliament: And whereas under or by virtue of the said Orders, divers Decrees and Orders of the said Court have been made as well for the foreclosure of divers mortgages of lands as for the sale of mortgaged premises, for the rescision of contracts, for the sale and purchase of lands, and for other purposes relating to or affecting real estate in that part of this Province heretofore constituting the Province of Upper Canada, in cases in which the Defendants in the said suits, or some or one of them, have been absent from the part of this Province aforesaid and resident without the jurisdiction of the said Court: And whereas in order to obviate all doubts which have arisen or may arise as to the titles of the Lands affected by such Decrees or Orders of the said Court, it is expedient that the same Decrees or Orders should be ratified and confirmed: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of the United Kingdom of Great Britain and Ireland, and intituled, *An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada*, and it is hereby enacted by the authority of the same, That all and every the Decrees and Orders of the said Court, under or in pursuance of the said Orders of the said Court of Chancery, in the said Schedule set forth, which have been respectively pronounced, enforced and perfected, shall be and the same and each and every of them is and are hereby ratified and confirmed, and shall be, and be deemed and taken to be as valid and effectual in all respects and to all intents and purposes, except as hereinafter provided, as if the Defendants in the several suits wherein such Decrees or Orders have been respectively pronounced or made, had been resident in the part of this Province aforesaid, and within the jurisdiction of the said Court of Chancery, and had respectively appeared in the said Court of Chancery in the said suits, and the proceedings in the same had been prosecuted to Judgment or Decree, and all other proceedings had been had and taken therein, according to the usual course and practice of the said Court of Chancery, in suits wherein the Defendants have appeared.

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

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

IV. Provided always, and be it enacted, That the Defendant or Defendants, or his or their representatives, in any cause wherein such Decree or Order as aforesaid, shall have been or shall or may be made or pronounced as aforesaid, may, within two years after the passing of this Act, or the pronouncement of such Decree, if pronounced after the passing of this Act, appear in the said Court of Chancery in the cause, and petition to be heard; and the party so petitioning, upon paying or securing to be paid such costs as the said Court shall adjudge, and submitting to such terms as to the said Court shall, under the circumstances of the case, seem just and reasonable, may, in the discretion of the Court (subject to appeal,) be admitted to answer the complainant's Bill, and set up such defence as he may be advised; and the suit shall then proceed in the same manner as if such Defendant had appeared in due season, and no Decree or no Report had been made, as the case may be: Provided always, nevertheless, that such Decrees or Orders shall not be absolute except in the case provided for by the next following section of this Act, until the expiration of the time in this section before limited.

V. Provided always, and be it enacted, That no sale or conveyance bonâ fide made under or by virtue of the said Decrees or Orders, hitherto made or pronounced upon a bill filed for the foreclosure or satisfaction of a mortgage or other charge, shall be affected or prejudiced by the appearance of the Defendant under the provisions hereinbefore contained, nor subject to such right of appeal as aforesaid, by any other proceeding; but such Defendant or his representatives may, at any time within one year after the passing of this Act, file a Bill or Petition against the complainant or his representatives, in the said Court, to account for all moneys received by them by virtue of such sale, over and above the amount which was justly due on the mortgage, and the costs of suit, together with his costs, charges and expenses subsequently incurred, with interest on the same respectively; and the said Court shall proceed upon such Bill, and make such Decree therein as, under the circumstances of the case, shall seem just and reasonable.

Schedule A.

Absent Defendants.

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

In Chancery _____ between, &c. _____ A. B., of &c.

maketh oath and saith, that a Writ of *Subpoena* to appear and answer to the above named suit, was issued out of, and under the Seal of this Honorable Court, directed to the above named Defendant, C. D., (a copy whereof is hereunto annexed) and was delivered to this deponent to be served, but this deponent could not find the said C. D. to serve him therewith {and if the deponent can so state, he shall proceed to add,) that he, this deponent, well knows that the said Defendant did formerly reside at _____, in this Province, but has since left the same, and now resides at _____, (but if these facts are not within the deponent's knowledge, then the Affidavit must proceed thus), and he, this deponent, was informed by (here state the name of the informer and his connection with the absent Defendant, that the Court may judge how far the information given may be relied on,) that he knew the Defendant, C. D., and that he formerly resided at _____, in this Province, but has since left the same, and now resides at _____, in the Province of Lower Canada, or, at _____ in the United States of America, (if the deponent can so depose upon the information given, or generally, if he be unable to state the particular place in the United States of America, (or, at _____, in England, Scotland, or Ireland, (or elsewhere, as the case may be.) If the Defendant have never resided in this Province, the Affidavit must be varied accordingly.

66. That in order to remove doubts which have arisen upon the construction of the Order of the twenty-fifth of August, one thousand eight hundred and thirty-seven, where the same applies to proceedings on the Common Law side of the Court, his Honour doth order that the same course of proceedings shall be adopted on the Common Law side of the Court, with respect to Defendants out of the jurisdiction thereof, as by the said Order is prescribed with reference to proceedings on the Equity side, *mutatis mutandis*.

68. That in all cases within the Order of the twenty-fifth of August, one thousand eight hundred and thirty-seven, relative to Defendants out of the jurisdiction, after any state of facts shall have been carried into the Master's Office, pursuant to the reference directed by the Decree, the Warrant, on leaving such state of facts, henceforth shall be discontinued, and the Plaintiff shall be at liberty immediately to apply for and obtain a Warrant to proceed on the state of facts.

178. Whereas in the case of Defendants residing without the jurisdiction of this Court, but whose place of residence is known, and who may therefore be served personally with the Process of this Court to compel such Defendants to appear to and answer the Plaintiff's Bill, it is deemed advisable to allow Plaintiffs to proceed against such absent Defendants, by personal service of such Process in cases where the same can be effected, instead of according to the present mode of proceeding against absent Defendants, it is therefore ordered, that upon motion in open Court, founded upon Affidavit or Affidavits and such other documents of evidence, if required or proper, as may be applicable for the purpose of ascertaining the residence of any Defendant or Defendants residing without the jurisdiction of the Court, and the facts material to identify such Defendant or Defendants, and his or their place or places of residence, it shall be competent for the Court to order and direct, that service of a *Subpoena* to appear and answer, upon such terms

and in such manner, and at such times, as to the said Court shall seem reasonable (or in cases where the Court shall deem fit, upon the Receiver, Steward, Bailiff, Agent, or other person receiving or remitting rents of lands and premises, if any, in the suit mentioned, or otherwise acting on behalf of such Defendant or Defendants in relation to the matter or matters which are the subject of such suit, returnable at such time as the Court shall direct,) together with a copy of such Order and of the prayer of the Plaintiff's Bill, shall be deemed good service upon such Defendant or Defendants, such Order to direct also in what mode such service may be authenticated, in cases where such service may be effected without the jurisdiction of this Court; and in case such Defendant or Defendants shall, after such service, make default in appearance by the time limited by such Order and Process aforesaid, the Plaintiff shall be at liberty to enter an appearance for such Defendant or Defendants, upon filing with the Registrar an Affidavit of such service sworn as in such Order directed; and if the Defendant shall not answer the Plaintiff's Bill within the time limited by such Order, the Plaintiff shall be entitled to an Order to set down the cause for hearing, in order that the Bill may be taken *pro confesso* against such Defendant or Defendants, upon filing with the Registrar his Proœcipe for that purpose; and thereupon a Decree may be made and enforced against such Defendant or Defendants accordingly, unless the Court on special circumstances disclosed by Affidavit, shall allow further time to such Defendant or Defendants to answer the Plaintiffs Bill: Provided nevertheless that the following notice, or such other notice as the Court may in any case direct, shall in such cases be endorsed on the said Writ of *Subpœna*, and signed by the Solicitor for the Plaintiff. Ordinary Notice to be endorsed *ad respondendum* in Absent Defendant Cases:

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

Ordered that in case the Court shall think fit so to direct, it shall be competent for the Court to order that the Plaintiff be at liberty either to proceed against such absent Defendant by such personal service of Process, or by publication of Order by advertisement, according to the previous practice of the Court in that behalf; and in such case the Plaintiff shall be at liberty, for the purposes of such advertisement, to take the usual Order in Absent Defendant Cases under the previous practice as aforesaid, without any further application to the Court in respect thereof.

75. That in all cases where the Plaintiff shall personally serve the Defendant with the Writ of *Subpœna* to appear and answer the Bill, and the Defendant shall make default in appearance at the time limited by the practice of the Court, the Plaintiff shall be at liberty to enter an appearance for such Defendant; and if the Defendant shall not answer the Bill within the time limited by the

Court in that behalf, the Bill may be ordered to be taken *pro confesso*, and a Decree made and enforced against him accordingly, unless the Court on special circumstances disclosed by Affidavit, shall allow further time to the Defendant to answer, in which case no such Order shall be entered until the expiration of such further time allowed; Provided nevertheless, that the following statement shall be added to the notice at present endorsed on the said Writ of *Subpæna*, and signed by the Solicitor for the Plaintiff, that is to say: And you will take notice that unless such appearance as before mentioned shall be entered, an appearance will be entered for you; and if you do not answer, the said complainant's Bill at or before the expiration of twenty-eight days, from and exclusive of the day on which such appearance shall be entered for you, you will be considered as confessing the truth of the matters alleged in the said Bill of Complaint, and a Decree will be made and enforced against you.