

aforesaid, or of any lot or plat within such cemetery, or shall wilfully destroy, cut, break, or injure any tree, shrub, or plant within the limits of such cemetery, shall be deemed guilty of a misdemeanor; and such offender shall also be liable in an action of trespass, to be brought in all such cases in the name of such association, to pay all such damages as shall have been occasioned by his unlawful act or acts; such money, when recovered, shall be applied by the trustees to the reparation or restoration of the property so destroyed or injured.

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- P. L. 1845, p. 921.
- " 1851, p. 317.
- " 1852, p. 256.
- " 1855, p. 55.
- " 1859, p. 82.
- " 1864, p. 704.
- " 1866, p. 878.
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- " 1868, p. 802.
- " 1869, p. 1033.
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Terms of court.

Term lost, suits, etc., continued.

Court always open for certain purposes.

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An act respecting the court of chancery.

Revision—Approved March 27, 1875.

I. The court when open.

1. That the court of chancery shall hold, annually, at Trenton, three stated terms, commencing on the first Tuesday of February, the third Tuesday of May, and the third Tuesday of October, respectively, and such special terms, at the same or any other place as the chancellor shall from time to time appoint.

2. That if the said court shall not sit or be opened at any of the said terms, whether stated or special, the writs and process then returnable, and the bills, suits, pleadings, and proceedings depending before the said court, shall be continued, of course, till the next term, and so from term to term, until the court shall sit.

3. That the said court of chancery shall be considered as always open for the granting of injunctions, writs of *ne exeat* to prevent the departure of defendants from the state, and other writs and process heretofore usually granted in vacation, and for the return of writs of subpoena to answer, and for making orders for the appearance of absent or concealed defendants, and that such orders may be to appear and plead, answer or demur, upon any day either in term time or vacation; and in default of such plea, answer, or demurrer, a decree *pro confesso* may be taken on any day, either in term time or vacation.

4. That in all cases where a decree *pro confesso* may be taken in vacation, it shall be lawful to make all orders of reference and other proceedings to perfect a final decree, and to make a final decree in vacation.

II. Subpœna and process for appearance, and how served.

5. That no subpoena or other process for appearance shall issue out of the court of chancery, except in cases to stay waste, until after the bill shall have been filed with the clerk of the court.(a)

(a) If the issuing of the subpoena before the bill be promptly brought to the notice of the court, it will be set aside as illegally issued, but it is a purely technical irregularity and is waived by entering an appearance, *Crowell v.*

Botsford, 1 C. E. Gr. 458. A mistake in antedating a subpoena, when in fact it was not issued before filing the bill, may be corrected, *Dinsmore v. Westcott*, 10 C. E. Gr. 302.

6. That every subpoena, process of sequestration, writ of execution, or other writ or process, shall be issued by a solicitor, or by the clerk, at the instance of the party, and, before the service or execution thereof, shall be subscribed or endorsed with the name of the said solicitor or party, and also signed and sealed by the said clerk. Process endorsed, signed and sealed.
7. That the names of all defendants in any suit, who are resident in the same county, shall be inserted in one subpoena or process. Names in one process.
8. That to every subpoena *ad respondendum*, a notice shall be added that the defendant is not required to appear at Trenton in person, at the return day, but, if he intend to make a defence, it is only necessary for him to answer, plead, or demur to the bill within the time required by law. Notice to be added to subpoena.
P. L. 1867, p. 166.
9. That where a bill shall be filed on any mortgage, or instrument in the nature thereof, for a foreclosure or sale of the premises contained in the same, or any part thereof, and the complainant shall deem it expedient to make any person a defendant therein, other than the mortgagor, his heirs, executors, administrators or assigns, such complainant shall, with the subpoena to be issued against such other defendant, cause to be issued a ticket in writing, shortly making known for what cause he is subpoenaed to answer; which ticket shall be, by the officer serving the subpoena, left with the said defendant at the time of such service, and no charge be made therefor. When ticket to issue.
10. That in any suit hereafter to be commenced in the court of chancery, wherein it shall be thought necessary or proper to make any married woman a party, and it shall appear by the affidavit of the complainant, his or her solicitor, annexed to the bill of complaint, and filed therewith, that, notwithstanding due inquiry has been made therefor, the christian name of such married woman cannot be ascertained, it shall and may be lawful and sufficient to designate any such married woman by the name of her husband, with "Mrs." prefixed thereto. Proceedings when christian name of married woman cannot be ascertained.
Ib.
11. That it shall and may be lawful for any married woman so designated in any suit, to appear and plead, answer or demur, either by the name by which she shall have been made a party, or by her own christian name, but if by the latter, she shall also state the name by which she was made a party. Married woman may appear and plead, &c.
P. L. 1873, p. 68.
12. That any and all proceedings had or taken in any suit against any married woman, who shall have been made a party as aforesaid, shall be as valid, binding and conclusive, in all respects, as they would have been had she been made a party by her own christian name. Proceedings to be valid and binding.
Ib.
13. That every subpoena or process for appearance shall be served on the person to whom it is directed, or a copy thereof left at his dwelling house or usual place of abode, at least ten days prior to its return. Subpoena, how served.
Amended.
14. That it shall be the duty of the sheriff or coroner, as the case may require, of any county in this state, to whom any subpoena, order, attachment, process of sequestration, writ of execution, or other process issuing out of the court of chancery, shall be directed or delivered, to serve or execute the same, and to make return thereof at the time and place therein mentioned, which shall be filed by the clerk.(a) Who to serve process.
15. That a written appearance in any suit in chancery, or a written acknowledgment of the service of any subpoena to answer, signed by a defendant, or his or her solicitor, shall have the same force and effect as if such defendant had been regularly served with a subpoena to answer, by the sheriff or any other proper officer; *provided*, such signature of the party be verified by affidavit.(b) What equivalent to service of subpoena.
16. That no writ of *ne exeat* shall be granted, unless satisfactory proof be made to the chancellor that the defendant designs quickly to depart Ne exeat.

(a) It is not essential that it be served by the sheriff or coroner. It may be served by a private person, but in such case an affidavit of the time and manner of service must be made, and on its return a rule taken on defendant to plead. *West v. Smith*, 1 Gr. Ch. 309. *Henderson v. Hopper*, *Hal. Dig.* 229. Upon a motion to dissolve an injunction on the ground that the subpoena has not been served, the sheriff's return to the subpoena is conclusive, and can not be contradicted by affidavits, unless collusion be shown between the sheriff and the complainant or his solicitor. *Corey v. Voorhees*, 1 Gr. Ch. 5. See *Randolph v. Daly*, 1 C. E. Gr. 314. The sheriff's return "served" upon the subpoena, is presumptive proof of the service of the notice required by the 38th rule. *Bell v. Gilmore*, 10 C. E. Gr. 104. PRACTICE OF LAW, § 48, and cases cited.

(b) An acknowledgment of service of a copy of the citation in a divorce suit, is not evidence of a legal service to give the court jurisdiction where the defendant does not appear. There should be evidence of the service of a copy of the petition also. *Stone v. Stone*, 10 C. E. Gr. 445. If defendant acknowledges service, and neglects to plead, answer or demur, after a rule for that purpose has been served on him, a decree will not be ordered against him, but a rule allowed that he answer within a limited time, or show cause why an attachment should not be awarded against him. *Henderson v. Hopper*, *Hal. Dig.* 229. See *Corse v. Colfax*, 2 South. *684.

from this state; (a) and, if granted, the chancellor, vice-chancellor, or an injunction master, shall direct to be endorsed thereon the sum in which the party shall give bond, with surety or sureties, being freeholders in this state.

When security for costs required or solicitor held responsible, or suit stayed.

17. That if the complainant reside out of this state, he shall, before the issuing of a process to appear, cause a bond to be executed by at least one sufficient person, being a freeholder and resident within this state, to the defendant, in the penal sum of one hundred and fifty dollars, conditioned to prosecute the suit with effect, and to pay costs to the defendant, if he shall be entitled thereto, and have the same filed with the clerk, or, in default thereof, the complainant's solicitor, who shall file the said bill and issue process thereon, shall be responsible to pay the defendant such costs as he may be entitled to by the order of the court; and if the said bill and process be signed by the complainant, and not by any solicitor, then the said suit shall be stayed till such bond be filed, and if it be not filed by the time appointed by the court, the bill shall be dismissed with costs. (b)

III. Proceedings against non-residents.

Non-resident defendants; how notified.

P. L. 1867, p. 166.

18. That in case of a bill filed against any defendant against whom a subpoena or other process to appear shall issue, and such defendant shall not cause his appearance to be entered in such suit, as, according to the practice of said court, the same ought to be entered, in case such process has been duly served, and it shall be made to appear, by affidavit or otherwise, to the satisfaction of the chancellor, that such defendant is out of the state, or cannot, upon due inquiry, be found therein, or that he conceals himself within this state, every such defendant shall be deemed and taken to be an absent defendant, and thereupon the chancellor may, by order, direct such absent defendant to appear, plead, answer or demur to the complainant's bill, at a certain day therein to be named, not less than two, nor more than six months from the date of such order; of which order such notice as the chancellor shall by rule direct shall, within twenty days thereafter, be served personally on such defendant, by a delivery of a copy thereof to him, or be published in one or more of the public newspapers printed in this state, and designated in such order, for six weeks successively, at least once in every week; (c) and in case of such publication, a copy of such notice shall be mailed to such defendant, prepaid, directed to him at the post office nearest his residence, or the post office at which he usually receives his letters, unless such residence or post office be unknown and cannot be ascertained upon making such inquiries as the chancellor may, by rule, prescribe in such case, which said notice shall also be published or served in any other manner that the chancellor may see proper in the same to direct; (d) and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within

Amended.

(a) A writ of *ne exeat* will not issue unless there is a debt due from the defendant to the complainant, or unless the complainant is entitled to an account, *Williams v. Williams*, 2 Gr. Ch. 130. It must appear by positive proof that there is a certain sum actually due, except in account, when the proof must show some sum due, *MacDonough v. Gaynor*, 3 C. E. Gr. 249. The affidavits to obtain a discharge of the writ must be equally explicit, *Myer v. Myer*, 10 C. E. Gr. 28. In a divorce case the affidavits cannot be made until after the petition is filed, *Bylandt v. Bylandt*, 2 Hal. Ch. 28. Upon a bill filed for alimony only the court may make an order for a *ne exeat* before the alimony is fixed, *Yule v. Yule*, 2 Stock. 138. But if it appears that the proceedings are not instituted in good faith for the purpose of obtaining a divorce, but for the purpose of compelling the husband to support the wife, a *ne exeat* previously issued will be discharged, *Kirrihan v. Kirrihan*, 2 McCart. 147. The affidavit of the wife is sufficient to obtain the order, *Yule v. Yule*, 2 Stock. 138. It should state that the defendant intends going abroad, and may in some cases be sworn to on information and belief, *Ibid.* But a mere apprehension of abandonment is not enough, *Anshutz v. Anshutz*, 1 C. E. Gr. 162. It is not necessary that the defendant be a resident of the state, or actually in the state, when the order is made, *Parker v. Parker*, 1 Beas. 105. *MacDonough v. Gaynor*, 3 C. E. Gr. 249. Even if the court feels constrained to discharge the writ it may require security to abide the decree, *Ibid.* Application to discharge the writ must be made before the cause is noticed for final hearing, *Müller v. Müller*, Sax. 386. See RULE 187.

(b) This right does not rest alone on the statute; it will be

granted if the complainant goes abroad to reside after the commencement of the suit, although resident here when his bill was filed; any steps taken in the cause by defendant after notice of non-residence or removal, is a waiver of the right to security, *Newman v. Landrine*, 1 McCart. 291.

(c) Where all the defendants live out of the state, publication must be made in a foreign paper, *Oram v. Dennison*, 2 Beas. 438. But not where some of them reside here, *Wetmore v. Dyer*, 1 Gr. Ch. 386. So, where a husband had separated from his wife, and he resided out of the state, service on her at her domicile was held insufficient, *McPherson v. Housel*, 2 Beas. 35. Issuing a subpoena against a non resident, taking an order for his appearance and publishing the order, will not give the court jurisdiction either over his person or the subject matter of the bill, if, from the nature of the case, the court has no jurisdiction over either, *Gifford v. Thorn*, 3 Hal. Ch. 90. An error in the name of the paper in which the notice to an absent defendant was directed to be published is amendable after sale under execution, *Equitable Life Assurance Society v. Laird*, 9 C. E. Gr. 319; affirmed, 11 C. E. Gr.

(d) It must clearly appear that the notice was sent to the defendant's P. O. address, and the source of the complainant's or his solicitor's, information must be stated, *Rogers v. Rogers*, 3 C. E. Gr. 445. The proof may be subsequently supplied, *Dinsmore v. Westcott*, 10 C. E. Gr. 302. Where the notice was entitled in the cause and not directed to the defendant nor mailed within twenty days after the date of the order, the defendant was held not to be within the jurisdiction of the court, *Karr v. Karr*, 4 C. E. Gr. 427.

some further time to be allowed by the chancellor, if he shall think proper, and on proof of personal service, or of the publication and the mailing of said notice, as aforesaid, and of the performance of the directions contained in said order, to the satisfaction of the chancellor, the chancellor may order and direct that the complainant's bill be taken as confessed against such absent defendant so failing to plead, answer, or demur, or the chancellor may, at his discretion, order the complainant to produce documents, depositions, exhibits, or other evidence to substantiate and prove the allegations in the bill, or the chancellor may examine the complainant on oath or affirmation, touching or concerning the allegations in the bill, and thereupon such decree shall be made, in either case, as the chancellor shall think equitable and just; (a) and that the provisions of this section shall apply to petitions and bills for divorce.

Decree *pro confesso* against, or proofs may be required.

19. That any defendant upon whom such notice is served as herein directed, shall be bound by the decree in such cause as if he were served with process within this state; but in cases where the same shall be published and sent by mail, if such defendant shall make oath that he did not receive the same, and that it did not in any way come to his knowledge, within twenty days after the time within which it was directed to be served; or in cases where actual service is sworn to, if it shall be made to appear by satisfactory proof, that such service was not made, the chancellor may, in his discretion, before executing such decree, proceed to take security in the manner provided in the twenty-first section of this act.

Non-residents bound by decree—
P. L. 1867, p. 166.

In certain cases security may be required.

20. That the proof of the matters required in the next two preceding sections may be taken before any judge of any court of record, or any notary public in any state or territory of the United States, and in any foreign state or country, before any notary public or any minister, secretary of legation, charge d'affaires, consul, or vice consul of the United States there being; the solicitor shall be entitled to one dollar and fifty cents for every notice served or mailed as aforesaid.

Proof of matters in two preceding sections; before whom made.
Id.

21. That when a decree shall be made against an absent defendant, the chancellor, before issuing process to compel the performance of such decree against such absent defendant, may, if he deems it equitable so to do, require the complainant to give bond, with such security and in such sum as he may direct, to abide such decree or order touching the restitution of the estate and effects of such absent defendant, or the repayment of any sum of money which the complainant may receive by virtue of such decree, but which shall afterwards be made to appear, as hereinafter provided, not to have been due and owing to him; and in case no such security shall be given, no process or execution shall issue to compel the performance of the decree so made against such absent defendant, but the estate and effects of such absent defendant may, by order of the chancellor, be sequestered, and remain under the direction of the chancellor, to abide such order as he shall think just and proper respecting the same; and in case any such absent defendant, against whom any decree shall be made as aforesaid, his heirs, devisees, executors, administrators, or assigns, as the case may require, shall, within six months after notice in writing be given to him or them of such decree, or within three years after such decree, in case no notice as aforesaid shall be given, petition the chancellor touching the matter of such decree, and pay, or secure to be paid, such costs as the chancellor shall think reasonable to order and direct, then and in such case the person or persons as aforesaid, so petitioning, may be permitted to appear and answer the complainant's bill, and thereupon such proceedings shall be had as if such absent defendant had appeared in due season and no decree had been made; or such absent defendant may, within the times aforesaid, file his bill of complaint in the said court, for an account and settlement of the amount which was really and truly due to the complainant at the time of the decree, and to compel the said complainant to refund and repay what he may have wrongfully recovered and received, together with the interest from the time of the receipt thereof, with costs of suit, the former decree against such absent defendant not-

Enforcing decree against absent defendant.

Chancellor may require bond, or sequestration may be ordered.

Time within which defendant may have relief.

May file bill.

(a) A mortgage may be foreclosed on lands owned by the United States, and the subpoena was ordered served on the U. S. District Attorney, *Elliot v. Van Voorst*, 3 Wall. Jr., 299.

When decree confirmed.

withstanding; but in case no petition shall be presented, or bill filed, as before provided for, within six months from the time notice as aforesaid shall be given, due proof thereof being made, or within three years from the date of the decree, the decree shall be deemed and adjudged to be confirmed; which confirmation shall have relation to the time of making said decree; and the decree shall be executed and performed as in cases where the defendant had duly appeared.

Notice to non-resident officers of corporations.

P. L. 1868, p. 802.

22. That whenever any bill shall be filed against any corporation of this state, and it shall be made to appear by affidavit, to the satisfaction of the chancellor, that none of the officers and directors of such corporation are resident in this state, or that none of them can be found within this state, to be served with process of subpoena, such corporation shall be deemed and taken to be an absent defendant; and that such proceedings and decree may be had against such corporation as in this act is provided in the case of absent defendants.

IV. Pleadings and proceedings after return of subpoena.

Bill may call for answer without oath.

P. L. 1867, p. 166.

23. That the complainant may, in any bill in chancery, pray that the defendant answer without oath, in which case the answer need not be sworn to, and the allegations and statements therein, whether responsive or not, shall not be evidence against the complainant, except on a motion to grant or dissolve an injunction, on which motion the statements and denials in an answer duly sworn to, shall have the same effect as heretofore; (a) and when an answer without oath is so prayed, the complainant may annex to the bill interrogatories, founded on statements in the bill, and the same or any part thereof may be addressed to all or any of the defendants, and each defendant to whom such interrogatories are addressed, shall answer the same, under oath or affirmation, fully, directly, and responsively, confining the answer to the interrogatory proposed; and such answers shall be annexed to the answer to the bill, be filed therewith, and be liable to be excepted to, as a part of the answer; and so far as responsive to such interrogatories, shall have the same effect as the responsive allegations in answers required to be sworn to; and any defendant omitting to answer any such interrogatory directly and fully may be compelled so to do, or the allegations in the bill upon which the interrogatory is founded, shall be taken as admitted to be true, and a decree made thereon accordingly; but nothing in this section shall affect any suit pending on the sixth day of March, one thousand eight hundred and sixty-seven, or any suit to be brought upon a claim for which a suit in equity was then pending. (b)

Amended.

Plea or demurrer: when to be filed. Amended.

P. L. 1831, p. 317.

24. That when a subpoena to answer shall have been returned duly served by the proper officer, or the appearance of the defendant shall have been signed, or service of a subpoena acknowledged, as hereinbefore mentioned, the defendant shall file his plea or demurrer to the bill of complaint within forty days from the return day of the subpoena, unless further time be granted, and the cause, within ten days thereafter, noticed and set down for argument for the next term, by the party demurring or pleading.

Answer, when to be filed.

Ib.

25. That the answer to any bill in chancery shall be filed within forty days from the time of filing the order for overruling the plea or demurrer, or within sixty days from the return of the subpoena, in case no plea or demurrer be filed, unless further time be granted.

Frivolous demurrer. Ib.

26. That when a demurrer shall have been filed which shall not be actually argued, or which, upon argument, appears to the chancellor to be frivolous, or intended for the purpose of delay, the same shall be overruled as frivolous, and the chancellor shall not grant in such suit any order extending the time to answer herein limited, unless, upon full examination of the circumstances of the case, it shall be made to appear to him that evident injustice would be done without such extension, and

(a) Where the bill prays an answer without oath, the answer, though sworn to, is not evidence for defendant, though any facts admitted are conclusive against him, *Hyer v. Little*, 5 C. E. Gr. 443. *Sweet v. Parker*, 7 C. E. Gr. 453. If sworn to, the answer is evidence on a motion to dissolve the injunction, although not on the hearing of the cause, *Walker v. Hill*, 6 C. E. Gr. 191.

(b) To entitle defendant to the advantage of his answer under oath, the answer must have been in a suit pending at the time of the passage of the act, and in reference to the same claim, *The Camden and Amboy Railroad Co. v. Stewart*, 4 C. E. Gr. 344.

then he shall grant such extension only as may be absolutely necessary, with proper diligence, to prepare such answer.

27. That every plea or demurrer in chancery shall have annexed thereto the affidavit of the defendant or defendants filing the same, or his or their agent in the suit, that the same is not interposed for delay, but in good faith; and also the certificate of counsel that he has perused the complainant's bill, and that such plea or demurrer is well founded in point of law; and every plea or demurrer filed without such affidavit and certificate may be treated as a nullity.

Affidavit and certificate to plea or demurrer.

28. That if the defendant shall not file his plea, demurrer or answer within the time hereby limited, or that granted by the court, the bill of complaint shall be taken in term time or vacation, as confessed against such defendant, and such decree made thereon as by the court shall be deemed equitable and just; or the chancellor may, at his discretion, order the complainant to produce documents and witnesses to substantiate and prove the allegations in the bill of complaint; or the chancellor may examine the complainant on oath or affirmation, to ascertain the truth of the allegations in the said bill; and such decree shall be made in either case as the chancellor shall think equitable and just; *provided*, that to prevent fraud or mistake, the chancellor may, at any time, upon notice and sufficient cause shown, grant a rule staying proceedings and to open such decree.(a)

Decree *pro confesso* in term or vacation.

29. That when the complainant conceives the plea to be good, though not true, he may reply to and take issue upon it, and proceed as in case of an answer.(b)

Issue on plea.

30. That if the defendant file a demurrer and answer, the complainant shall not proceed on the answer till the demurrer has been argued or disposed of.

Demurrer first argued.

31. That if the plea or demurrer be overruled, no other plea or demurrer shall be thereafter received; but in such case the defendant shall file his answer to the complainant's bill in forty days after such overruling; and if he fail to do so, the said bill shall be taken as confessed, and the said court shall thereupon proceed as directed in the twenty-eighth section of this act.(c)

If plea or demurrer over-ruled, answer must be filed.

32. That if the plea or demurrer be allowed, the complainant shall pay costs, and if overruled, the defendant shall pay them.(d)

Costs on plea or demurrer.

33. That the complainant shall file exceptions or a replication, or set down a cause for hearing upon bill and answer within thirty days after the expiration of the time limited or granted for filing the answer, or on failure thereof his bill shall be dismissed, with costs, unless good cause be shown to the contrary.(e)

When exceptions or replication must be filed.

(a) The only right to make a decree against a defendant who does not appear is derived from this statute. Before this the party could be compelled to appear and answer, but no decree could be made until he did appear. *Brinkerhoff v. Franklin*, 6 C. E. Gr. 336. See *Giveans v. McMurtry*, 1 C. E. Gr. 468. A decree *pro con.* signed after the time for answering has expired, is regular, though an order for further time to answer be signed and filed on the same day. If it appear that the answer contains no valid ground of defence, the decree will not be opened, *Emery v. Downing*, 2 Beas. 59. The decree may be taken without notice, and as of course, unless it appear that the adverse party will be prejudiced thereby, *Oakley v. O'Neill*, 1 Gr. Ch. 287. See RULE 92. If the defendants obtain further time to answer they cannot set up an inequitable defence, such as usury, *Remer v. Shaw*, 4 Hal. Ch. 355. *Vanderveer v. Holcomb*, 7 C. E. Gr. 555. *Collard v. Smith*, 2 Beas. 43. *Marsh v. Lasher*, 2 Beas. 253. *Campion v. Kille*, 1 McCart. 229. *Hill v. Colie*, 10 C. E. Gr. 469. See *Roberts v. Birgess*, 5 C. E. Gr. 139; or that a corporation in making a loan to secure which their mortgage was given, were acting *ultra vires*, *Third Ave. Savings Bank v. Dimock*, 9 C. E. Gr. 26. Parties must take notice of the acts and decrees of the court regularly made, *Hillyer v. Schenck*, 2 McCart. 399. A decree will be opened three years after its entry for the purpose of correcting an obvious mistake in the master's report, *Miller v. Rushforth*, 3 Gr. Ch. 174; if the party applying has not been in laches, *Williamson v. Sykes*, 2 Beas. 182; or where a decree has been made unjustly against a right or interest that has not been heard or protected, *Brinkerhoff v. Franklin*, 6 C. E. Gr. 335; or a bill may be filed to correct the decree, *Whittemore v. Coster*, 3 Gr. Ch. 438. A decree was opened on application of a subsequent mortgagee to charge the first mortgagee, who was in possession of the premises, with rent, *Moore v. Degraw*, 1 Hal. Ch. 346. On the ground of surprise and sacrifice, *Smith v. Alton*, 7 C. E. Gr. 572. Where the defence is meritorious, and the party has

not been heard, through mistake, accident or surprise, *Embury v. Bergamini*, 9 C. E. Gr. 228. But not if he has had an opportunity of making his defence and neglected it, *Miller v. Hill*, 3 Stock. 25. Nor where the only allegation of surprise is that defendant is unacquainted with the proceedings of the court, *Carpenter v. Muchmore*, 2 McCart. 123. Nor on the unsupported affidavit of the defendant that complainant verbally agreed not to prosecute the action, *Marsh v. Lusher*, 2 Beas. 253. Nor, five years after entry and four years after it came to defendant's knowledge, upon the ground of his pecuniary inability to make the application at an earlier day, *Robertson v. Miller*, 2 Gr. Ch. 451.

(b) If the plea should be decided not to be good the defendant must answer the bill; if it is sustained, the complainant must reply to it. When he does reply and takes issue, the determination of that issue is final, *Flagg v. Bonnel*, 2 Stock. 82. The issue is not upon the mere technical form of the plea, but the sufficiency of its averments to sustain the defence, *Meeker v. Marsh*, Sax. 193. *Davison v. Johnson*, 1 C. E. Gr. 112. If defendant has a substantial defence which cannot avail him under his plea, from inaccuracy of pleading, he may claim the full benefit of such defence by his answer, *Mathews v. Roberts*, 1 Gr. Ch. 338.

(c) After a demurrer is overruled the defendant cannot file a plea, *White v. Dummer*, 1 Gr. Ch. 527. *Hall v. Nicholson*, Hal. Dig. 231. Nor will leave to file a plea be granted after demurrer overruled if it is manifest that the plea offered, if true in fact, would be no bar to the relief sought by the bill, *Seely v. Price*, 1 Hal. Ch. 231. See *Broadwell v. Denman*, 2 Hal. 278.

(d) The court has no discretionary power in the matter of costs on a demurrer, *Hicks v. Campbell*, 4 C. E. Gr. 184. See *Andrews v. Ford*, 2 Hal. Ch. 488.

(e) Exceptions to report of commissioners in partition, will not lie. They are limited to answers and the reports

- Rule to refer exceptions. 34. That when exceptions shall be filed to an answer, a rule may be entered, of course, with the clerk, either in term time or in vacation, to refer the same to a master of the court, who shall decide and report upon them within thirty days after they are filed; but an appeal from such report shall be allowed to the chancellor, who shall hear and determine the same at the next term or at such time as the chancellor, upon the application of either party, shall appoint.(a)
- Amended. 35. That the complainant, if his exceptions be overruled, shall pay costs to the defendant; and the defendant, if his answer be adjudged insufficient, shall pay costs to the complainant.(b)
- Costs on exceptions. 36. That when an answer shall be adjudged to be insufficient, the defendant shall file a second or further answer within thirty days after such adjudication, or on failure thereof the said bill shall be taken as confessed, and such proceeding had thereon as if the first or original answer had not been filed within the limited or granted time.(c)
- When second answer required. 37. That if such second or further answer shall be adjudged to be insufficient, the defendant shall pay double costs, and shall file a third or further answer within twenty days after such adjudication, or on failure thereof the said bill shall be taken as confessed, and such proceedings be had thereon as if the first or original answer had not been filed within the limited or granted time as aforesaid.
- When third answer required, and costs. 38. That if such third or further answer shall be adjudged to be insufficient, the defendant shall pay treble costs; and in such case further time to answer shall not be allowed, but the said bill shall be taken as confessed, and such proceedings be had thereon as if the first or original answer had not been filed in due time.
- Consequences, if insufficient. 39. That if a cross-bill be exhibited, the defendant to the first bill shall answer thereto before the defendant to the cross-bill shall be compelled to answer such cross-bill.(d)
- Cross-bill and answers. 40. That every cause in the court of chancery shall be deemed to be at issue on filing a replication; and it shall not be necessary to issue a subpoena or enter a rule to rejoin in any case.
- When cause at issue. 41. That where, after the filing of the bill, any person shall acquire such an interest in the subject matter of the suit as would have made him a proper or necessary party, if such interest had been possessed by him at the time of the commencement of the suit, it shall not be necessary to file
- Person acquiring interest after bill filed may be made a party. P. L. 1870, p. 41.

of masters, *Bentley v. Long Dock Co.*, 1 *McCart*. 480. It is the practice upon filing a report on exceptions to an answer to take an order that the same shall be confirmed, unless cause be shown in eight days after service of the same. *Weber v. Weiling*, 3 *C. E. Gr.* 39. The exceptions may be heard by the chancellor, the rule to refer them to a master is only for his relief, *Camden and Amboy Railroad Co. v. Stewart*, 4 *C. E. Gr.* 343. Where an answer is filed by any defendant there can be no reference to a master without setting the cause down for hearing, or without the consent of the defendant who filed the answer. *Wright v. McKean*, 2 *Beas.* 259. *Young v. Young*, 2 *C. E. Gr.* 161. *Failoute v. Haycock*, 1 *Gr. Ch.* 105. If the answer is evasive, or if there is no answer to any of the material facts stated in the bill, and no reason assigned for not answering them, it will be considered as no answer, and the court will order it taken from the files. But if it be an answer, however defective, the complainant must either file exceptions or a replication, or set down the cause for hearing on bill and answer, *Travers v. Ross*, 1 *McCart*. 254. Defects in an answer are not cured by not excepting to it, *Doughty v. Doughty*, 3 *Hal. Ch.* 227.

(a) A demurrer cannot be filed, *Travers v. Ross*, 1 *McCart*. 254. Exceptions to a master's report must be filed within eight days, *Taylor v. Thomas*, 1 *Gr. Ch.* 106. The report of a master on exceptions to an answer is brought before the chancellor, not by exceptions to the master's report, but by appeal, *Wheeler v. Redmond*, 2 *Hal. Ch.* 153. *Weber v. Weiling*, 3 *C. E. Gr.* 39. But irregularities in the proceedings of the master, as a refusal to adjourn an examination to afford defendant an opportunity to produce witnesses, must be taken advantage of by motion to set aside the report, *Douglas v. Merciles*, 9 *C. E. Gr.* 25. See *Jackson v. Jackson*, 2 *Gr. Ch.* 96. On exceptions on a question of fact the court will come to a conclusion upon the evidence, irrespective of the master's opinion, *Holmes v. Holmes*, 3 *C. E. Gr.* 141. But the master's report is entitled to great weight and will not be set aside where there is conflicting testimony, *Ibid.* *Haulenbeck v. Conkright*, 8 *C. E. Gr.* 408. *Sinnickson v. Bruere*, 1 *Stock*. 659. The master must not exceed the reference in his examination and report, *Stonington Savings Bank v. Davis*, 2 *McCart*. 31. *Petrick v. Ashcroft*, 5 *C. E. Gr.* 198. So a further reference may be ordered and additional evidence offered if the master fail to report on a material matter, *Dutch Church v. Smock*, *Sax.* 148; or where the report is based on erroneous views, *Blawell v. Ackerman*, 5 *C. E. Gr.*

141. But if no further directions are necessary an error of the master as to the value of certain property, may be corrected without any further reference, *Huston v. Cassidy*, 1 *McCart*. 320. *Morris v. Taylor*, 3 *C. E. Gr.* 132. *Chance v. Teeple*, 3 *Gr. Ch.* 173. If exceptions are filed to the master's report the complainant may set the cause down preparatory to further directions or a final decree, and, if the exceptions be overruled, may get a final decree at the term at which the cause is so set down, *Brundage v. Goodfellow*, 4 *Hal. Ch.* 513. *Morris v. Taylor*, 3 *C. E. Gr.* 131.

(b) Where the exceptions are sustained in part and overruled in part, neither party can have costs, *Camden and Amboy R. R. Co. v. Stewart*, 4 *C. E. Gr.* 350.

(c) Where to a bill for a foreclosure, an answer was filed setting up defect of title to the mortgaged premises, exceptions taken to part of the answer, and the exceptions sustained, the cause should have been set down on the argument list, and a decree *pro con.* entered for want of a second answer, might have been set aside, *O'Brien v. Hulfish*, 7 *C. E. Gr.* 478. See *Vanderveer v. Holcomb*, 7 *C. E. Gr.* 558.

(d) The answer of the defendant to the cross-bill may be considered as substantially, and for all practical purposes, a replication to the defendant's answer to the original bill, *Whyte v. Arthur*, 2 *C. E. Gr.* 521. A cross-bill against a complainant should in general be filed at the time of filing the answer, and in all cases before closing the testimony. But the first rule does not apply to a cross-bill by one defendant against another, nor does the last, to cases in which no testimony has been taken, *Vanderveer v. Holcomb*, 6 *C. E. Gr.* 105. The proper time for filing a cross-bill, where such bill is necessary, is at the time of putting in the answer to the original suit, and before the issue is joined by filing the replication, *Stevens v. Stevens*, 9 *C. E. Gr.* 78. Where the cross-bill was not filed until a year after the filing of the original bill, and after the proofs had been taken, the original cause noticed for a hearing, and a proper decree could be made without a cross-bill, the chancellor would not delay the hearing on the original bill on the ground that the complainant had not answered the cross-bill, *Williams v. Carle*, 2 *Stock*. 543. Upon a cross-suit the answer of the complainant to the original suit, is evidence so far as responsive to the cross-bill, *Graham v. Berryman*, 4 *C. E. Gr.* 29. Reversed, 4 *C. E. Gr.* 574. A defendant in his cross-bill, can not set up a case inconsistent with the case made in his answer to the original bill, *Jackson v. Grant*, 3 *C. E. Gr.* 145.

a supplemental bill to make such person a party, but the same may be done by petition filed in the cause, and which petition, verified by oath, shall state the interest of such person, and the manner in which the same was acquired; and a copy of the petition and notice of the application shall be served on the complainant or his solicitor, and notice of the application shall be served on such of the defendants as the chancellor shall direct, if made before the time for answering has expired, and, if after that time, on each defendant who has answered or appeared in the cause; and the chancellor may thereupon, if it appear that such person is entitled to be made a party to the cause, and has acquired his interest from some party to the same, order that he be made a party thereto; but such person shall be bound by all orders and proceedings in the cause against the party whose interest he has acquired, and the cause shall not be delayed by the admission of such party, except for such time as it may seem to the chancellor to be necessary to take the evidence regarding such claim.(a)

42. That in all cases in which it is provided in this act that a person may be made a party by petition after the commencement of the suit, such person may be made a party either before or after an interlocutory or final decree therein, but such decree shall not be opened or set aside thereby, and in all cases where the person so made a party does not dispute the claim of the complainant, or any part of it, the complainant, or any defendant whose prior right is not disputed, shall not be delayed by the admission of such party; but his claim shall be fully heard and investigated in disposing of the residue of the subject matter of the suit, or of the proceeds thereof.

Parties may be added, either before or after final decree.

P. L. 1870, p. 42.

Amended.

V. Evidence; interrogatories; examination of witnesses.

43. That if any complainant proceed to a hearing on bill and answer only, the answer shall be taken to be true in all points; and no evidence shall be received unless it be matter of record, to which the answer relates, and is provable by the same record.(b)

Hearing on bill and answer.

44. That the defendant in chancery, after he shall have filed his answer, may exhibit interrogatories to the complainant, which shall be answered by him on oath or affirmation; and such answer shall be evidence in the cause in the same manner and to the same effect as the defendant's answer to the complainant's bill is evidence; and if the complainant shall not answer such interrogatories by the time appointed by the court, he shall be in contempt, and his bill dismissed, with costs.(c)

Interrogatories to complainant.

45. That all examinations of witnesses hereafter to be taken and made use of at the hearing of any cause in the court of chancery, except such

Examination of witnesses.

(a) Where a first mortgagee, contrary to the agreement with the mortgagor, collected the full amount of the mortgagor, without resorting to the mortgage, and a second mortgage given by a subsequent owner was foreclosed and the master reported the first mortgage paid, the former owner on petition was admitted to defend and be subrogated, and the sheriff was forbidden to proceed under this section. The court refused to determine on this application whether the matter between the first mortgagee and mortgagor had been decided by suit in another state, because the point involved the merits of the controversy. The petitioner need not submit his proposed answer or bill to the court before filing it; all that can be required is that he satisfy the court, by setting forth facts duly verified, that he has a bona fide claim to such an interest as entitles him to be made a party to the suit, *Conrad v. Mullison*, 9 C. E. Gr. 65. After a decree pro con. and sale of the premises under a foreclosure the purchaser may be admitted as a party defendant, but not to file an answer. He may avail himself of any defence the mortgagor could have set up after a decree, *Hewitt v. Montclair Railway Co.* 10 C. E. Gr. 100, affirmed 11 C. E. Gr.

(b) The allegations of the answer as to facts, so far as they are responsive to the bill, must be taken as true, *Cammann v. Traphagen*, Sac. 28. *Morris and Essex R. R. Co. v. Blair*, 1 Stock. 635. *Fowler v. Roe*, 3 Stock. 367. *Gaskill v. Sine*, 2 Beas. 180. *Brown v. Buckley*, 1 McCart. 294. *Reed v. Reed*, 1 C. E. Gr. 248. *Force v. Dutcher*, 2 C. E. Gr. 165. *Vanderveer v. Holcomb*, 2 C. E. Gr. 547. *Voorhees v. Voorhees*, 3 C. E. Gr. 223. *Bird v. Styles*, 3 C. E. Gr. 297. *Booraem v. Wells*, 4 C. E. Gr. 87. *DeHart v. Baird*, 4 C. E. Gr. 423. *Inhabitants of Winslow v. Hudson*, 6 C. E. Gr. 172. *Stearns v. Stearns*, 8 C. E. Gr. 167. See *Thomas v. DeBaum*, 1 McCart. 37. *Bent v. Smith*, 7 C. E. Gr. 560. Intentions and motives are not facts, touching which the answer is conclusive, *Belford v. Crane*, 1 C. E. Gr. 265. So, an admission or allegation of fact in the answer will not avail the complainant unless put in issue by the bill, *Hoff v. Burd*, 2 C. E. Gr. 201; or accepted by complainant, *Whitney v. Robbins*, 2 C. E. Gr. 360. Nor

can the defendant deny or question by the proofs a fact admitted by the answer, *Lippincott v. Ridgway*, 3 Stock. 528. *McNee v. Smith*, 1 C. E. Gr. 463. The rule does not apply to an answer which upon its face is incredulous, *Stevens v. Post*, 1 Beas. 408. Nor where the denial, although express, is of a fact of which the defendants admit themselves to be ignorant, *Bailey v. Stiles*, 2 Gr. Ch. 245. Nor where it asserts a right affirmatively in opposition to complainant's demand, *Fisler v. Porch*, 2 Stock. 243. Nor where matter is pleaded by way of confession and avoidance, *Miller v. Wack*, Sac. 204. *Morris Canal Co. v. Mayor of Jersey City*, 3 Stock. 13. *Stevens v. Post*, 1 Beas. 108. *Roberts v. Birgess*, 5 C. E. Gr. 139. An answer, although responsive, may contain within itself such statements as will alone deprive it of all efficacy, *Commercial Bank v. Reckless*, 1 Hal. Ch. 650. An allegation that a defendant has seen the answer of another defendant in the same cause, and that the same is true, is insufficient, *Carr v. Wald*, 3 C. E. Gr. 41; 4 C. E. Gr. 319. So if sworn to before an officer in another state, not authorized by the statutes of this state, or the rules of this court, to take an oath to an answer, *Trumbull v. Gibbons*, Hal. Dig. 233. *Freytag v. Hoeland*, 8 C. E. Gr. 36. *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601. For form of verification, see *Pincers v. Robertson*, 9 C. E. Gr. 348; if defendant be absent from the country, *Stotesbury v. Vail*, 2 Beas. 390.

(c) The object of examining a party under oath, is to make a discovery of facts supposed to be within his knowledge, and of which the evidence cannot be otherwise attained, *Jackson v. Jackson*, 2 Gr. Ch. 96. Their examination, like that of other witnesses, is subject to all just exceptions at the hearing, *Neville v. Demeritt*, 1 Gr. Ch. 321. Before a party can be examined as a witness an order must be obtained, *Hewitt v. Crane*, 2 Hal. Ch. 159. *Sharp v. Runk*, Hal. Dig. 234. *Decker v. Caskey*, Hal. Dig. 234. Nor will complainant be ordered to answer interrogatories, unless they are filed within the time limited by the rules of the court, unless defendant can show good reasons for not complying with the rules, *Phelps v. Curtis*, 1 Gr. Ch. 387.

as shall be taken before the vice chancellor, shall be taken and reduced to writing by one of the examiners of said court, or before a commissioner or commissioners appointed by the chancellor according to the course of the court, who are hereby authorized to administer the proper oath or affirmation to the witnesses examined by them, or any of them; and all examinations of witnesses before examiners shall be taken on ten days' notice of the time and place of taking such examination, given by the party or his solicitor to the opposite party or his solicitor; and either of the parties in the cause shall and may, in their proper persons, or by their solicitor or counsel, have liberty to be present and examine and cross-examine such witnesses; all which examination of witnesses so taken shall be filed with the clerk of the court, to be made use of and read in evidence upon the hearing of the cause, saving all legal exceptions.(a)

Pleadings and evidence; when printed.

P. L. 1866, p. 878.

46. That it shall be lawful for the chancellor in such cases as he may judge proper, to order the pleadings and evidence, or any part thereof, to be printed, and to order the expense of such printing to be taxed as part of the costs in the cause.(b)

VI. Setting down the cause and the hearing.

When cause to be set down for hearing.

R. S. 912.

Proviso.

What if complainant do not attend.

What if defendant do not attend.

47. That every cause shall be set down for hearing at the next stated term after the filing of the replication; or on failure thereof, the complainant's bill shall be dismissed, with costs, unless the court, on just cause and reasonable terms, allow further time for the said hearing; and if the said hearing be not had within the time so limited or allowed, then the court shall dismiss the said bill, with costs; *provided always*, that there be fifteen days between the filing of the replication and the next stated term; and if there be not, then the hearing shall be had at the subsequent stated term or at a special term.(c)

48. That if the complainant shall not attend at the time appointed for the hearing of the cause, his bill shall be dismissed, with costs.

49. That if the defendant shall not attend at the time appointed for the hearing of the cause, the bill, answer, replication, documents, examinations and proofs shall be read, on the part of the complainant, and the court thereupon shall decree in favor of the complainant or dismiss his bill, as the case may require.

(a) The rules of evidence are generally the same in equity as at law, *Runyon v. Farmers Bank*, 3 Gr. Ch. 480. Every person, whatever his office or dignity, is bound to appear and testify when required to do so by proper process, unless he has a lawful excuse. An order to testify is an unusual proceeding, and ought not to be made against the executive of the state, *Thompson v. The German Valley R. R. Co.*, 7 C. E. Gr. 111. The competency of a witness is determined by his status when he is sworn and examined, *Walker v. Hill*, 7 C. E. Gr. 513. *Mulford v. Minch*, 3 Stock. 17. *Van Houten v. Post*, 6 C. E. Gr. 365. If he is then competent, his deposition may be read at the hearing, although the opposite party has since died, without his deposition having been taken, *Marlatt v. Warwick*, 4 C. E. Gr. 433. So if a witness, who has signed his direct examination, dies before he is cross-examined, his testimony may be read, *Flavell v. Flavell*, 5 C. E. Gr. 213. Or if he dies after a commission is returned, *Lawrence v. Finch*, 2 C. E. Gr. 235. *Ramsey v. Dumars*, 4 Harr. 66. But if he secretes himself so that he can not be cross-examined, his deposition will be suppressed, *Flavell v. Flavell*, 5 C. E. Gr. 213. The objection to a witness on the ground of incompetency, must be made when he is offered for examination, if then known, *Berryman v. Graham*, 4 C. E. Gr. 29, 6 C. E. Gr. 370. *Howell v. Auten*, 1 Gr. Ch. 44. *Neville v. Demeritt*, 1 Gr. Ch. 321. A party can not wait until after the direct examination of the witness and thereby ascertain whether the testimony is favorable or otherwise, *Sheridan v. Medara*, 2 Stock. 469. If the incompetency appear at any time during the examination, the testimony should be overruled, *Den, Howell v. Ashmore*, 2 Zab. 261. *Den, Downam v. Cambloss*, 1 Gr. 136. So the incompetency may be shown by parol, although written evidence of it exist, *Mayo v. Gray*, Pen. *837. *Den, Howell v. Ashmore*, 2 Zab. 261. See *State v. Bailly*, Pen. *415e. The evidence of an incompetent witness may be legalized by the neglect of the party, having the right, to object, or by being subsequently examined himself and assenting to the truth of the statements, *Beckman v. Montgomery*, 1 Mc. Cart. 107. *Walker v. Hill*, 7 C. E. Gr. 513. See *Delany v. Noble*, 2 Gr. Ch. 441. Or if objections taken before the master are not renewed at the hearing, or when the depositions are acted on by the court, they are waived, *Black v. Lamb*, 1 Beas. 109. Where a cause in a divorce suit is referred to a master, it is irregular to examine a witness before another master, *Cook v. Cook*, 2 Beas. 263. A witness should not be allowed to have his direct testimony read to him before cross-examination, such irregularity is not sufficient to

suppress the testimony, but must almost destroy the credibility of the witness, *Derby v. Derby*, 6 C. E. Gr. 36. The deposition of a witness before a master must be signed by the witness; if not signed it is imperfect, and can not be read at the hearing, *Flavell v. Flavell*, 5 C. E. Gr. 211. A witness ought not to be examined the second time on the same matter, *Crawford v. Bertholf*, Sac. 458. But if the opposite party do not object, the party offering it, can not, *Delany v. Noble*, 2 Gr. Ch. 441. If the witness has been re-examined without an order of the court for that purpose, the court will reject the second examination, *Hanson v. First Church*, 3 Stock. 441. A refusal by a master to adjourn an examination at request of counsel to afford him an opportunity to produce witnesses, is good cause for a motion to set aside the report, *Douglas v. Mercedes*, 9 C. E. Gr. 25. Testimony will not be suppressed before the hearing, *Brown v. Bulkley*, 1 McCart. 294. See RULES OF CHANCERY, § 64-84.

(b) See RULES OF CHANCERY, § 147.

(c) Where on the 20th of May, the defendant took an order on complainant, to speed his cause, served the order the next day, and on the 22nd the complainant filed his replication, and took no further step, it was held that defendant was entitled to have the bill dismissed at the next term, *West v. Paige*, 1 Stock. 203. If a defendant fails to notice his demurrer for argument, and complainant omits to take advantage of it at the first term thereafter, he may do so at a subsequent term, without first taking an order on defendant to bring it to argument. But he must serve a rule to answer on defendant before taking a decree *pro con.*, *Nesbit v. St. Patrick's Church*, 1 Stock. 76. Where a plea of a former suit pending is pleaded, complainant may take issue upon the facts of the plea, or a reference to a master whether both suits are for the same matter. If he does neither, the defendant must set down the plea for argument, *McEwen v. Broadhead*, 3 Stock. 129. A motion to strike out an insufficient plea is not correct practice, the plea should be set down for argument, *Corlies v. Corlies*, 8 C. E. Gr. 197. Exceptions to a master's report must be set down for hearing, the same as other causes, *Morris v. Taylor*, 8 C. E. Gr. 131. When an answer is filed, to which there is neither exception nor replication, the cause should be set down for hearing on bill and answer, and a decree *pro con.* and order of reference can not be taken except by consent of the defendant, *Young v. Young*, 2 C. E. Gr. 161. See RULE 92.

50. That the bill, answer, pleadings, papers, documents, examinations and proofs filed in the cause shall be used at the argument or hearing, for which no charge shall be made by the clerk. Papers used at hearing.

VII. Decree, its enrollment and effect.

51. That when any cause shall be finally determined in the court of chancery, except where the suit, bill, or proceeding shall be dismissed by consent, the clerk of the court shall enter or enroll together, in order, the bill, answer, pleadings, reports, decretal orders, and decree in such cause, in a book to be kept for that purpose, which shall be signed by the chancellor as of the day on which such decree was pronounced; (a) but such decree shall not contain any recital of the said bill, answer, or other pleadings. Pleadings, etc., to be enrolled.

52. That whenever any suit, bill or proceeding shall be dismissed out of the court of chancery, in pursuance of any consent or agreement of the parties for that purpose, no enrollment of the bill, petition, answer, or other proceedings had in such suit, shall be necessary; nor shall any fees be allowed or taxed therefor; *provided always*, that either party may, at his or their own expense, require the same to be enrolled. (b) No enrollment if bill dismissed by consent. Proviso.

53. That whenever the proceedings and decree in any case are by law required to be entered or enrolled in manner aforesaid, it shall be the duty of the clerk to enter or enroll the same, so that the record may be ready to be signed by the chancellor within three months after the final decree in such cause shall have been filed with the said clerk; and no clerk shall charge any fee therefor until such service shall have been actually performed. Clerk, when to enroll.

54. That whenever any cause shall be finally determined in the court of chancery, and the person then being clerk of the said court shall cease to be such, by death or otherwise, before he shall have entered or enrolled the proceedings in such cause, in manner aforesaid, if by law they ought to be so entered or enrolled, then it shall be the duty of his successor in office, within three months after his appointment, to make or cause to be made such entry or enrollment. When enrolled by clerk's successor.

55. That if the chancellor, by whom any cause shall have been finally heard and determined, shall go out of office, and some other person shall be appointed chancellor before the proceedings and final decree in such cause shall have been enrolled and signed in the book kept for that purpose, then it shall be the duty of his successor in office, or the chancellor for the time being, to sign such enrollment with his own name, prefixing to such signature the words "by the statute;" and all proceedings and decrees so signed, shall be as good and effectual in law, to all intents and purposes, as if the same had been duly signed by the chancellor who pronounced such final decree. How decrees signed after chancellor goes out of office.

56. That the decree of the court of chancery shall, from the time of its being signed, have the force, operation, and effect of a judgment at law in the supreme court, from the time of the actual entry of such judgment; and all decrees and orders of the court of chancery, whereby any sum of money shall be ordered to be paid by one person to another, shall have the force, operation, and effect of a judgment at law in the supreme court, from the time of the actual entry of such judgment, and the chancellor may order such executions thereon as in other cases; *provided*, that no decree of the court of chancery, hereafter to be made, shall, as against any person not a party thereto, become a lien upon or bind any lands, tenements, hereditaments, or real estate, other than those specifically mentioned and described in such decree, or in the bill of complaint on which the same is founded, until the parties interested in such decree, or some or one of them, shall have filed in the office of the clerk of the supreme court a statement or abstract of such decree, containing the names of all the parties thereto, designating particularly those against whom it Effect of decree. P. L. 1855, p. 55. Proviso. Lands not bound until abstract filed in Supreme Court office.

(a) Where a party in interest dies after the argument and before the signing of the decree, the decree and orders in the cause should be signed and filed as of the date of the argument; an order for that purpose is necessary. *Burnham v. Dalling*, 1 C. E. Gr. 310. So, where a sole complainant or defendant dies, *Benson v. Wolverton*, 1 C. E. Gr. 110. See *Den v. Tomlin*, 3 Harr. 14. *Hess v. Cole*, 3 Zab. 116. *Erie Railway Co. v. Ackerson*, 4 Vr. 33. *Hillyer v. Schenck*, 2 McCart. 398. (b) A bill was dismissed with the consent of complainant's solicitor. The fees for enrolling were stricken out, *Andrews v. Ford*, 2 Hal. Ch. 488. See *Winans v. Watworth*, Hal. Dig. 241.

is rendered, with the state and county in which they respectively resided, the time at which the said decree was signed, and the amount of the debt, damages, costs, or other sum of money thereby directed to be paid; which statement or abstract the said clerk shall forthwith record in a proper book, to be by him provided and kept in his office for that purpose; which book shall be properly indexed by the said clerk, and be a public record, to which all persons desirous to examine the same shall have access.^(a)

Lis pendens.

57. That neither the filing of a bill in chancery, nor any proceedings had or to be had thereon, before a final decree, shall be deemed or taken to be constructive notice to any *bona fide* purchaser or mortgagee of any lands or real estate to be affected thereby, until the complainant in such bill, or his solicitor, shall have first filed in the office of the clerk of the court of common pleas of the county in which such lands or real estate lie, a written notice of the pendency of such suit, setting forth the title of the cause and the general object thereof, together with a description of the lands or real estate to be affected thereby; *provided*, that nothing in this section contained shall be construed or taken to apply to any bill filed or to be filed for the satisfaction or foreclosure of any duly registered mortgage.^(b)

Notice of suit to be filed in county clerk's office.

Proviso.

Clerk to file and record notice.

58. That it shall be the duty of the clerk with whom any such notice shall be filed, forthwith to record the same, together with the time of the filing thereof, in a proper book, to be by him provided and kept in his office for that purpose; which book shall be properly indexed by the said clerk, and be a public record, to which all persons desirous of examining the same shall have access.

Fees.

59. That the following and no other fees shall be allowed for the services required by the two last preceding sections of this act, viz: to the county clerk, for filing and recording each notice, ten cents per folio; to the clerk of the supreme court, for filing and recording every statement or abstract, twenty-five cents; which fees shall be included with the other costs in the cause, and taxed therewith, by the clerk of the court of chancery.

Proceedings in case of final decree for defendants, when a *lis pendens* has been filed.

P. L. 1868, p. 68.

60. That whenever a final decree shall be made in favor of the defendant or defendants, in any cause affecting the title to any lands and real estate, notice of the pendency of which has been filed in the office of any county clerk or clerks, it shall be the duty of the said clerk or clerks to enter upon the margin of the record of such notice a statement of the substance of such decree, upon a copy thereof, certified under the seal of the court of chancery, being filed in his office, and thereafter the lands and real estate mentioned in the said notice shall be and remain discharged of all equities set up in the bill of complaint in said suit, notwithstanding the said suit be thereafter revived.

Proceedings in case the chancellor orders the lands and real estate to be discharged.

Ib.

61. That in all suits instituted in the court of chancery for the enforcement of any claim for the payment of money upon any lands and real estate, except for the foreclosure of a mortgage, and notice of the pendency of which shall be filed in the office of any county clerk or clerks, it shall be lawful for the chancellor, and he is hereby empowered to make an order discharging the said lands and real estate from such claim, upon the defendant or defendants giving sufficient and satisfactory security, in such sum and manner as the chancellor may direct, for the payment of such sum or sums of money as may by the final determination of the said cause be ascertained to be chargeable upon the said lands and real estate, and upon filing a copy of the said order, certified under the seal of the court of chancery with the said county clerk or clerks, he or they shall make entry

(a) A decree, in case of a creditor's bill against an administrator, is a judgment from its date in favor of all the creditors, and they are entitled to be paid ratably unless they have some legal priority, *Hazen v. Durling*, 1 Gr. Ch. 134. This section was only intended to make decrees a lien, the same as judgments of the supreme court are, *Van Buskirk v. Mulock*, 8 Harr. 185. A decree can confer no higher or better title than a sale of the premises by virtue of an execution upon a judgment at law, *Thomas v. De Baum*, 1 McCart. 37. A personal decree for deficiency of proceeds to pay the mortgage debt does not become a lien upon the real property of the person against whom it is taken, until after the sale, and a deficiency is found to exist, *Bell v. Gilmore*, 10 C. E. Gr. 104. *Mutual Life Insurance Co. v. Southard*, 10 C. E. Gr. 337. A decree for a divorce *a mensa et thoro*, directing an annuity to be paid to the wife, and that it should be a lien from its date upon the hus-

band's lands, is not a judgment so as to bind the lands against strangers to the suit, when no abstract has been filed, *Vreeland v. Jacobus*, 4 C. E. Gr. 231.

(b) A conveyance by the defendant after the filing of the notice cannot affect complainant's rights, *Beechman v. Montgomery*, 1 McCart. 107. *Lis pendens* filed, without any bill having been filed, as a constructive notice is a nullity, *Walker v. Hill*, 7 C. E. Gr. 514. The notice only takes effect from the time of serving the subpoena, *Haughwout v. Murphy*, 6 C. E. Gr. 118; 7 C. E. Gr. 531. A person purchasing *pendente lite* is treated as a purchaser with notice, and subject to all the equities of the person under whom he claims, *McPherson v. Housel*, 2 Beas. 299. *Allen v. Morris*, 5 Vr 159. *Williams v. Winans*, 5 C. E. Gr. 392. Reversed, 7 C. E. Gr. 573. So a party claiming an interest under a deed not recorded at the time of filing the bill, *Dinsmore v. Westcott*, 10 C. E. Gr. 302.

of said discharge, by reason of said order, on the margin of the record of said notice, and the said lands and real estate shall be thereafter discharged from any claim which may be made in the said suit, except such as may be covered by the security given for the payment of such claim.

62. That the county clerk shall be entitled to receive the sum of fifty cents for each service required in the two preceding sections. Fees of clerk.
1b.

63. That where a decree of the court of chancery shall be made for a conveyance, release, or acquittance of lands or any interest therein, and the party against whom the said decree shall pass, shall not comply therewith by the time appointed, then such decree shall be considered and taken, in all courts of law and equity, to have the same operation and effect, and be as available as if the conveyance, release, or acquittance had been executed conformably to such decree, and this, notwithstanding any disability of such party by infancy, lunacy, coverture, or otherwise. Effect of decree
to convey lands.
P. L. 1852, p. 256.

VIII. Final process and duty and liability of sheriff.

64. That the complainant having obtained a decree, it shall be lawful for the said court to issue process for the immediate sequestration of the real and personal estate of the defendant, or so much thereof as may be sufficient to satisfy the demand of the complainant in the decree specified, with costs, or to issue a writ of *feri facias* against the goods and chattels, lands and tenements, hereditaments and real estate, of the defendant, upon which sufficient property shall be taken and sold to satisfy the said demand, with costs, or to issue a *capias ad satisfaciendum* against the defendant, upon which writs of *feri facias* and *capias ad satisfaciendum* there shall be the same proceedings as at law; or to cause, by injunction, the possession of the effects and estate demanded by the bill and whereof the possession or a sale is decreed, to be delivered to the complainant or otherwise, according to such decree and as the nature of the case may require; (b) and in case of sequestration, the court shall order payment and satisfaction to be made out of the estate so sequestered, according to the true intent and meaning of the decree. Process after de-
cree.

65. That a writ of *feri facias* shall bind the property or the goods of the person against whom it is issued, from the time that it shall be delivered to the sheriff or other officer to be executed, as at law. Lien of the fieri
facias.

66. That if the sheriff or other officer shall neglect or refuse to execute any process of sequestration to him directed and delivered, or to make payment of the rents, issues, and profits of the estate so sequestered, according to the order of the said court, or, where the execution shall be by *feri facias*, shall neglect to file a just and true inventory of the goods and chattels, lands, tenements, hereditaments, and real estate so levied on and seized, unless he return that he hath levied to the amount of the demand or sum therein specified, with costs, or shall voluntarily or negligently omit, for the space of two months, to render to the complainant, or his representative or solicitor, the money which he shall have received from the sale of the estate, real and personal, of the defendant or otherwise, then such sheriff or officer shall be amerced by the said court to the amount of the demand of the complainant, with costs, for the use of the said complainant; *provided*, that ten days' notice in writing shall be given to such sheriff or officer by the complainant, his representative or solicitor, of the intended application for such amercement; which amercement, so ordered by the court, shall have the force, operation, and effect of a decree. When sheriff to
be amerced.

Proviso.

(a) A decree directing a conveyance to be made, vests the estate so that the rights of the parties, in case of a variance between the decree and the conveyance, must depend upon the former rather than the latter, *Price v. Sisson*, 2 *Beas.* 168; 2 *C. E. Gr.* 476. A decree that a sheriff's deed should become void, and the purchaser re-convey on the payment to him of a certain sum within a specified time, is not such a decree as becomes a conveyance under this section, *Klopping ads. Stelmacher*, 7 *Vr.* 177.

(b) A court of equity, in order to give to the complainant the full benefit of its decree, will put the purchaser into possession of premises sold and conveyed in pursuance of its decree, *Thomas v. De Baum*, 1 *McCart.* 37. *Frazier v. Beatty*, 10 *C. E. Gr.* 343. It can only issue against persons who are parties to the suit, or who come into possession under the defendant after its commencement, *Blauvelt v. Smith*, 7 *C. E. Gr.* 31. A stranger purchasing the premises is entitled to the benefit of it. The mode of proceeding is (1)

a demand of possession by the purchaser of the tenant in possession, accompanied by an exhibit of the deed from the sheriff or master; (2) the order to deliver possession; (3) injunction; (4) writ of assistance, *Schenck v. Conover*, 2 *Beas.* 220; and the writ will only issue upon notice of the application and proof that the deed was shown to the tenant, possession demanded and that he refused, *Fackler v. Worth*, 2 *Beas.* 395. The writ was refused because the sale was not sufficiently advertised as to one of the tracts sold, *Vannmeter v. Borden*, 10 *C. E. Gr.* 414. See also *Den. Smallwood v. Bilderback*, 1 *Harr.* 497. *Den. v. Johnson*, 7 *Hal.* 275. *Den. McAndrews v. O'Hanlin*, 3 *Harr.* 127. *Bayard v. Colefax*, 4 *Wash. C. C.* 43. *Corles v. Lashley*, 2 *McCart.* 116. A conveyance of real estate before sequestration issued, although after the decree upon which it is founded, is valid, in the absence of any proof of *mala fides*, *Vreeland v. Jacobus*, 4 *C. E. Gr.* 231.

(c) See EXECUTIONS, § 18.

whereon execution, in the name and for the use of the said complainant or his representative, may instantly, on motion in term time, and without further proceedings, be awarded and issued against the goods and chattels, lands, tenements, hereditaments, and real estate of the said sheriff or officer.

Amercement of sheriff in certain cases.

67. That if the sheriff or other officer shall neglect or refuse to execute any writ of *feri facias* to him directed or delivered, for the space of two months, or shall adjourn the sale or vendue of the lands, tenements, hereditaments, and real estate by him levied upon by virtue of such writ of *feri facias*, more than twice or exceeding one month for each adjournment, he shall be and hereby is made liable to the amount of the debt or damages and costs, or sum or sums of money mentioned in the said writ, with interest, and for the recovery thereof may be amerced and proceeded against in the manner prescribed in and by the last preceding section of this act; *provided always*, that if the said sheriff or other officer shall, at any time before the entry of such amercement against him as aforesaid, sell the property levied upon, and bring the whole amount of the product of such sale (after deducting his lawful fees) into court, the said sheriff or other officer shall be exonerated from all liability, on account of said amercement.

Further remedy to party aggrieved.

68. That if any party to a suit in chancery shall be aggrieved by the neglect, default, malpractice, or misconduct of the sheriff, then such party, his representative or attorney, may apply and be redressed, to the amount of the sum specified, in the order or decree, in the manner prescribed by the sections of the act entitled "An act concerning sheriffs."

Sheriff not returning process to be in contempt.

69. That if any sheriff or other officer, to whom any writ, process, or order of the court of chancery shall be directed or delivered, shall not make return thereof at the day of return, and according to the tenor of such writ, process, or order, the same not being countermanded, he shall be in contempt, and process of contempt shall, on motion in term time, be issued against him; and before he shall be discharged from such contempt, he shall pay to the clerk, for the use of the state, as a fine for the said contempt, a sum not exceeding fifty dollars, to be imposed by the court, and the costs incurred by means thereof.

Proceedings in case of death of sheriff.

P. L. 1855, p. 55.

70. That when any sheriff, or other person, to whom any writ of execution issuing out of the court of chancery hath heretofore been directed and delivered, or shall hereafter be directed and delivered, hath died or shall die, or hath or shall become disabled by law to discharge the duties of his office or appointment, or hath removed or shall remove out of the state and continue to reside thereout, without discharging the duties of his office or appointment in relation to the command of said writ, then, or in either of said cases, it shall and may be lawful for the court, upon presenting a petition setting forth the facts above mentioned, and verified to the satisfaction of the court, and upon due notice being given to the other party, to award and order another execution, to be directed to the sheriff of the proper county, or to one of the masters of said court, commanding him to proceed to discharge the exigencies of said writ in the same manner as such officer so dying, becoming disabled, or removing, as aforesaid, was commanded in and by said writ to do, and any proceeding had by such officer to whom such writ shall be directed and delivered, shall be as good, valid, and effectual as if the said execution first issued had been originally directed to him; and such sheriff or master shall be entitled to the same fees for services done, and subject to the same suits, penalties, amercements and proceedings for neglect of duty as if the said execution had been originally directed and delivered to such sheriff or master.

IX. Proceedings in foreclosure.

Mortgaged premises may be sold under decree.

71. That where a bill shall be filed for the foreclosure or satisfaction of any mortgage, it shall be lawful for the said court to decree a sale of the mortgaged premises, or such part thereof as shall be sufficient to discharge the said mortgage or encumbrances on the said mortgaged premises,^(a)

(a) This imposes no different duty upon the sheriff, as to the quantity of the premises to be sold, than if it had commanded him simply to raise the money required by a sale of the mortgaged premises. *Parkhurst v. Cory*, 3 *Stock*. 234. His duty is to sell only so much of the premises as may be necessary to satisfy the requirements of the execution,

provided such portion can be conveniently and reasonably detached from the residue of the property. *Vanduyne v. Vanduyne*, 1 *C. E. Gr.* 93. See also *Merwin v. Smith*, 1 *C. E. Gr.* 183. *Ryerson v. Boorman*, 3 *Hal. Ch.* 167, 640. *Black v. Morse*, 3 *Hal. Ch.* 509. *Corles v. Lashley*, 2 *McCart.* 160. Where a mortgagor, after giving a mortgage, sells a part

besides costs; (a) which sale shall be made either by one of the masters of the court or by the sheriff of the county where the premises are situated, by virtue of a writ of *feri facias* issued for that purpose; which said writ of *feri facias* shall, before it is sued forth, be recorded by the clerk of the said court in the book kept by him for recording of executions against real estate.

72. That the sheriff or other officer to whom such writ of *feri facias*, as mentioned in the last preceding section, shall be directed and delivered, shall make sale pursuant to the command of said writ, and shall make and execute a deed or deeds for the premises sold, as the case may require; and the moneys arising from the said sale shall be applied to pay off and discharge the moneys decreed to be paid, and the remainder, if any there be, and if the person or persons entitled to receive it shall be absent out of this state, may be invested in stock of the United States, or put at interest on such security as the said court shall think proper to order; and the same shall be delivered or paid to the person or persons entitled to receive it, upon his or her application to the court for the same; (b) *provided always*, that no greater estate in the premises sold shall at any time be conveyed or granted to such purchaser than would have vested in the mortgagee had the equity of redemption been duly foreclosed.

Proceedings under *feri facias*.

Surplus money invested.

Proviso.

73. That in all cases of a decree for sale of mortgaged premises against any absent defendant, if such defendant shall, at any time before the sale made by the sheriff, in pursuance of any writ of execution, issued as aforesaid, cause his appearance to be entered in court, and shall pay such costs to the complainant as the court shall think reasonable, then it shall and may be lawful for the said court, by a writ of *supersedeas*, directed to the sheriff or other officer, to stay his proceedings on the execution for the sale of such mortgaged premises; and thereupon such proceedings shall and may be had, as if an appearance had been entered, within such time and in such manner as, according to the rules of the court, the same ought to have been entered, in case the first process in the suit had been duly served.

Supersedeas in case absent defendant enter appearance.

74. That when a decree of the court of chancery shall be made for the sale of mortgaged premises (in cases where the whole sum secured by the mortgage is not due) either for non-payment of any portion or instalment of the debt or demand intended to be secured by the mortgage, or the non-payment of interest due, or both, and it shall appear to the court that a part of the mortgaged premises cannot be sold to satisfy the amount due without material injury to the remaining part of the mortgaged premises, and that it is just and reasonable that the whole of the mortgaged premises should be sold together, it shall and may be lawful for the said court to decree a sale to be made of the whole of the mortgaged premises, and to apply the proceeds of the sale of said premises or so much thereof as shall be necessary, as well to the payment of the interest, instalments, or portions then due, and also the costs then due and payable, as to the payment of the whole or residue of the debt or demand which hath not become due and payable, (c) and the residue of the proceeds

Sale when the whole of the mortgage money not due.

of the mortgaged premises to a third person for a valuable consideration, the residue of the premises in the hands of the mortgagor or his vendee, must be sold first to satisfy the mortgage, *Shannon v. Marselis*, Sax. 413. *Britton v. Updike*, 2 Gr. Ch. 125. *Winters v. Henderson*, 2 Hal. Ch. 31. *Black v. Morse*, 3 Hal. Ch. 509. *Keene v. Munn*, 1 C. E. Gr. 398. *Weatherby v. Slack*, 1 C. E. Gr. 491. Proceedings where such subsequent purchaser does not pay the purchase money to the mortgagor, *Selle v. Andrews*, 4 C. E. Gr. 410. The above rule does not prevent such mortgage from becoming a lien on a part of the premises only, by agreement between the parties, *Wickoff v. Davis*, 3 Gr. Ch. 234. *Engle v. Haines*, 1 Hal. Ch. 186. *Hoy v. Bramhall*, 4 C. E. Gr. 563. See *Klapworth v. Dressler*, 2 Beas. 62. *Sliger v. Mahone*, 9 C. E. Gr. 426. Nor can the first mortgagee by releasing a part of the premises covered by his mortgage, affect the rights of a subsequent mortgagee or purchaser of which he had notice, *Johnson v. Olcott*, 4 Hal. Ch. 161. *Gaskill v. Sine*, 2 Beas. 400. *Blair v. Ward*, 2 Stock. 119. *Vanorden v. Johnson*, 1 McCurt 376. *Hoy v. Bramhall*, 4 C. E. Gr. 563. *Ward v. Haque*, 10 C. E. Gr. 397. Adjustment of equities between mortgagees and purchasers, where there had been several successive sales of the premises in different lots, and a mortgagee had released one of the lots last sold, *Mount v. Potts*, 8 C. E. Gr. 188.

(a) Costs refused a mortgagee, *Large v. Van Doren*, 1 McCurt.

208. *Demarest v. Berry*, 1 C. E. Gr. 481. *Young v. Young*, 2 C. E. Gr. 161. Allowed to a mortgagee on a bill to redeem by the mortgagor, *Burlew v. Hillman*, 1 C. E. Gr. 23. *Phillips v. Pulsizer*, 5 C. E. Gr. 309. But a tender of the amount due on the mortgage after its maturity, held to entitle mortgagor to costs, *Shields v. Lozeau*, 7 C. E. Gr. 447; 8 C. E. Gr. 509. Where the mortgagee's conduct in refusing to receive it, seemed neither improper nor vexatious, costs refused to either party, *Hill v. White*, Sax. 435. See *Mellick v. Creamer*, 10 C. E. Gr. 429.

(b) Where upon a petition for surplus money an order of reference is made to a master, the master must make his report and a final order of the court be made before the money can be paid over, *Ex parte, Allen*, 1 Gr. Ch. 388. In an attachment case the surplus money was ordered to be paid to the auditors, *Brantingham v. Brantingham*, 1 Beas. 160.

(c) Where the principal was not due and the mortgagee, on a foreclosure for non-payment of interest, purchased the whole of the premises, held, he thereby extinguished the mortgage, *Mott v. Shreve*, 10 C. E. Gr. 438. Proceedings for sale when a mortgage is foreclosed for default of payment of an instalment, the residue of the money not being due, *American Ice Insurance Co. v. Ryerson*, 2 Hal. Ch. 9. So, for default in the payment of interest when due, *Baldwin v. Van Vorst*, 2 Stock. 577. *Martin v. Melville*, 3 Stock. 222. *DeGroot v. McCotter*, 4 C. E. Gr. 531. *Spring v. Fisk*, 6 C. E.

of such sale to be paid to the person or persons entitled to receive the same, or to be brought into court to abide the further order of the court, as the equity and circumstances of the case require; *provided always*, that when the residue of the debt or demand intended to be secured by the said mortgage is payable at a future day without interest, and the mortgagee is willing to receive the same, the court shall deduct a rebate of legal interest for what the mortgagee shall receive on the said debt or demand, to be computed from the time of the actual payment thereof to the time such residue of the debt or demand would have become due and payable.

Stay of sale on appearance, and no plea, demurrer, or answer.

75. That in any suit for the foreclosure and sale of mortgaged premises, in which an appearance shall have been entered by any defendant, and no plea, answer, or demurrer shall have been filed, no execution shall issue until the expiration of such time from the date of the final decree as may be fixed by the rules of the court, not less than two, nor more than four months; *provided*, that nothing herein contained shall restrain the issuing of such execution for more than six months from the return of the process to answer in such suit.(a)

Decree for excess of debt over proceeds of sale.

Amended.

P. L. 1866, p. 878.

76. That it shall be lawful for the chancellor in any suit for the foreclosure or sale of mortgaged premises to decree the payment of any excess of the mortgage debt, above the net proceeds of the sales, by any of the parties to such suit who may be liable, either at law or in equity, for the payment of the same; *provided*, that there be a prayer to that effect in the bill of complaint.(b)

Satisfaction of decree to be entered.

P. L. 1867, p. 166.

77. That when the amount due on any decree in chancery for the foreclosure and sale of mortgaged premises shall be paid and satisfied in any other way than by a sale of the mortgaged premises, or when any decree in chancery for the payment of money shall be paid and satisfied, satisfaction shall be entered on the margin of the enrollment by the party receiving satisfaction, or his solicitor, or by the clerk, by virtue of a warrant of attorney from the party duly acknowledged or proved, in the same manner as satisfaction is entered of judgments at law; and upon filing an acknowledgement of such satisfaction, under the hand of the solicitor of any party, such satisfaction may be entered for him by the clerk, and the same fees shall be paid as in the supreme court for like services.(c)

Persons whose mortgages, &c., are not recorded, bound by decree.

P. L. 1870, p. 41.

78. That in any suit for the foreclosure of a mortgage upon, or which may relate to real or personal property in this state, all persons claiming an interest in, or an encumbrance or lien upon such property, by or through any conveyance, mortgage, assignment, lien, or any instrument which, by any provision of law, could be recorded, registered, entered, or filed in any public office in this state, and which shall not be so recorded, registered, entered, or filed at the time of the filing of the bill in such suit, shall be bound by the proceedings in such suit, so far as the said property is concerned, in the same manner as if he had been made a party to and appeared in such suit, and the decree therein made against him as one of the defendants therein; but such person, upon causing such conveyance, mortgage, assignment, lien, claim, or other instrument to be recorded, registered, entered, or filed as provided by law, may cause himself to be

Gr. 175. *Fausel v. Schabel*, 7 C. E. Gr. 126. *Bodine v. Gray*, 9 C. E. Gr. 335. The condition under which the forfeiture is claimed must be explicit, *Ackens v. Winston*, 7 C. E. Gr. 444. And the courts lean against forfeiture, *Thorne v. Mosher*, 5 C. E. Gr. 257. *Griggs v. Landis*, 6 C. E. Gr. 494. A receipt of interest upon a mortgage, without claim of forfeiture, after the time when, by its terms, the principal became due, and endorsing the payment of the interest on the mortgage, held, a waiver of the forfeiture, *Sire v. Wightman*, 10 C. E. Gr. 102. See *Griggs v. Landis*, 6 C. E. Gr. 494. See also *Warwick v. Matlack*, 2 Hal. 165. *Rosenkrantz v. Durling*, 5 Dutch. 191. *Griffith v. Jones*, Pen. *932.

(a) See RULES OF CHANCERY, § 36.

(b) Where one purchasing lands assumes in his deed to pay off a bond and mortgage of his grantor, to which such land is subject, he thereby becomes a surety in respect to the mortgage debt. The mortgagee may enforce such liability personally against the purchaser to the extent of the deficiency in a bill to foreclose, *Klapworth v. Dressler*, 2 Beas. 62. Such decree can only be made where the grantor was personally liable for the amount, *Ibid.* *Hoy v. Bramhall*, 4 C. E. Gr. 570. *Stiger v. Mahone*, 9 C. E. Gr. 430. See *McLenahan v. McLenahan*, 3 C. E. Gr. 101. It may be made

against one who guarantees the mortgage in his assignment, *Jarmon v. Wiswall*, 9 C. E. Gr. 267. But see *Kirbypatrick v. Judson*, 9 C. E. Gr. 272. A parol agreement to assume the mortgage, if proved, will be sufficient, *Wilson v. King*, 8 C. E. Gr. 150. See *Bolles v. Beach*, 2 Zab. 680. A notice stating that a personal decree for such deficiency will be taken against the person liable, must be served or published, RULE 38. *Jarmon v. Wiswall*, 9 C. E. Gr. 69. *Wilson v. King*, 8 C. E. Gr. 150. The decree may be amended on petition and notice, *Ibid.* But not where there is an adequate remedy at law, *Jarmon v. Wiswall*, 9 C. E. Gr. 267. Nor where there is no personal liability, *Embury v. Bergamini*, 9 C. E. Gr. 27. A personal decree for such deficiency does not become a lien upon the real estate of the person against whom it is taken, until after the sale, and a deficiency is found to exist, *Bell v. Gilmore*, 10 C. E. Gr. 104. *Mutual Life Insurance Co. v. Southard*, 10 C. E. Gr. 337.

(c) Where a mortgagee is made a defendant in a suit to foreclose a prior mortgage, and the decree gives such mortgagee his costs, he will not be required to cancel or release his mortgage before the costs are paid, *Lewis v. Conover*, 6 C. E. Gr. 230.

made a party to such suit by petition, in the same manner as is by this act provided in the case of persons acquiring an interest in the subject matter of a suit after its commencement; the petition in such case must set forth such instrument at length, and the title and interest of such party in such a manner as to show that he has an interest in the subject matter, and is a proper party in that suit.(a)

May be made parties.

79. That it shall be lawful, in any action in the court of chancery, for the foreclosure of any mortgage, for the clerk to tax, as a part of the taxable costs, in favor of any party to said action, any all such legal fees and charges as may have been actually paid or incurred by said party in obtaining official certificates of search in any of the courts or public offices of this state, against or in relation to the title of the mortgaged premises; *provided, however,* that the master of said court to whom it shall be referred to ascertain the amount due upon said mortgage shall, in his report, also certify that, in his opinion, such certificates of search are necessary for the proper foreclosure of said mortgage. (See *Sec. 121.*)

Fees for searches allowed.

P. L. 1873, p. 48.

Proviso.

X. Injunctions.

80. That no injunction shall issue to stay proceedings at law in any personal action after verdict or judgment, on the application of a defendant in the said proceedings at law, unless a sum of money equal to the amount due at the time of such deposit upon said verdict or judgment, with costs, shall be first deposited with the clerk of the court by the applicant for such injunction, or unless said applicant shall give such security, by bond, as the chancellor shall deem good, to the party or parties at law against whom such injunction is prayed, in double the amount then due on such verdict or judgment and the costs at law, with condition to abide such order or decree as the chancellor shall make in the premises; or if the bill be dismissed, to pay the amount of the said verdict or judgment and costs, with the interest thereon.(b)

Injunction after verdict or judgment in personal actions.

81. That no injunction shall issue to stay proceedings at law in any mixed action after verdict or judgment, on the application of a defendant in the said proceedings at law, unless the applicant shall first deposit with the clerk of the court such sum of money as the chancellor shall direct, or give such security, by bond, to the party against whom the injunction is prayed, as the chancellor shall direct.(c)

In mixed actions.

82. That when any injunction shall be granted upon bond as aforesaid, and the party against whom the same has been granted shall think the said bond not sufficient security, such party may apply to the chancellor to have the security made sufficient; whereupon the chancellor, if he shall deem it expedient to hear such applicant, shall direct notice to be given to the party giving such bond to appear before him at such time and place as he shall appoint; and upon proof that the notice directed has been duly served, the chancellor shall hear the matter, if moved so to do, with power to adjourn; and if, upon the hearing of the matter, it shall appear that the said bond is not sufficient security, then the chancellor shall have power to order further security; and if such further security shall not be given, according to the order made for that purpose, then, for that cause, the chancellor shall have power to dissolve the injunction granted on such bond.

Remedy if security insufficient.

83. That the chancellor shall have power to refer the whole matter of the last preceding section to a master in chancery, who shall hear the parties, after at least six days' notice to the party giving the said bond, and make report to the chancellor with all convenient speed.

Chancellor may refer question.

(a) Where a lien claim was filed after the commencement of a suit in this court to foreclose a mortgage which was on the lands before the work was done or materials provided for which the lien was claimed, and the lien claimants were not made parties to the suit, and did not apply to be made parties, the claim was held to be cut off by sale under the foreclosure. *Raymond v. Post*, 1 C. E. Gr. 447. A person who is not a party to a suit may, after decree, file a bill to be relieved against the effect of the decree; as if there is a decree in favor of mortgage and judgment creditors, a creditor of the mortgagor, if he can show that the mortgage and judgment are kept on foot for the benefit of the mortgagor and to defeat his creditors, may file such bill. *Robinson v. Davis*, 3 Stock. 302. See *Dinsmore v. Westcott*, 10 C. E. Gr. 304.

(b) Applies as well to a bill of interpleader, where an injunction is prayed, as to other cases. *Morris Canal Co. v. Bartlett*, 2 Gr. Ch. 9. An injunction issued to restrain proceeding in attachment against a non-resident debtor for the recovery of the judgment debt at the instance of the defendant in attachment, will be dissolved unless the amount of the judgment be deposited with the clerk before issuing the injunction. *Kenney v. Ogden*, 2 Gr. Ch. 168. A judgment entered by confession upon a bond with warrant of attorney, is within the act. The injunction was ordered to be set aside with costs, unless complainant within three days deposit the money or give the security required by the statute. *Marlatt v. Ferrine*, 2 C. E. Gr. 49.

(c) See RULE 45.

- Injunction before verdict; affidavit required. 84. That no injunction shall be granted to stay proceedings in any suit at law, before a verdict or judgment, unless the chancellor be satisfied of the complainant's equity, either by affidavit, certified at the foot or on the back of the bill, that the allegations thereof are true, or by other means.(a)
- Motion to dissolve after answer. 85. That no motion to dissolve an injunction which has been regularly obtained, shall be heard until ten days after the answer is filed, if the party rely in any measure on his answer for the dissolution.
- Notice of special motions. 86. That neither a motion to dissolve an injunction, nor any other special motion, shall be heard, unless eight days' notice, exclusive of Sunday and the day of service, shall have been given thereof to the opposite solicitor.(b)
- Breach of injunction to stay waste punished. 87. That if the person against whom an injunction shall be issued to stay waste, shall, after the service thereof, do or commit, consent or direct, or suffer to be done or committed, any waste or destruction of or upon the premises, contrary to the said injunction, and the chancellor, on affidavit or other proof, shall be of opinion that such waste or destruction hath been done or committed, then the said chancellor may, on motion, order an attachment of contempt to be issued against the person so charged with disobedience to, and a breach of the said injunction; and if the person so offending shall be brought before the chancellor, by virtue of the said attachment, and shall not make it appear to his satisfaction that no waste or destruction hath been done or committed as aforesaid, then the said chancellor may, in his discretion, and on motion, order such offender to be committed, and kept in close custody, until he shall give further order therein.(c)

XI. Proceedings with respect to unsatisfied judgments at law.

- Bill for discovery. R. S. 921. 88. That hereafter, whenever an execution against the property of a defendant shall have been issued on a judgment at law, and shall have been returned unsatisfied, in whole or in part, leaving an amount or balance remaining due exceeding one hundred dollars, exclusive of costs, the party suing out such execution may file a bill in chancery to compel the discovery of any property or thing in action belonging to the defendant in such judgment, and of any property, money, or thing in action, due to him or held in trust for him, except such property as is now reserved by law, and to prevent the transfer of any such property, money, or thing in action, or the payment or delivery thereof to the defendant,(d) except

(a) There must be a special affidavit of the truth of all the material facts. They need not be proved by the oath of complainant. The person who has the knowledge of the facts should verify them, *Youngblood v. Schamp*, 2 *McCart*. 42. *Holdrege v. Guymne*, 3 *C. E. Gr.* 27. Where the complainant relies on his own oath, the charges in the bill should be direct and positive, and any irregularity in the bill or affidavit is not waived by filing an answer; nor can such defect be supplied at the hearing. *Perkins v. Collins*, 2 *Gr. Ch.* 482. A notice to dissolve "for irregularity in the proceedings," is bad. The notice should state the irregularity, *Miller v. Traphagen*, 2 *Hal. Ch.* 200. *Brown v. Winans*, 3 *Stock*. 287.

(b) A notice is good though dated on Sunday, *Taylor v. Thomas*, 1 *Gr. Ch.* 106. See *Scott v. Dow*, 2 *Gr.* 350. A party is entitled to notice of a motion for the appointment of a receiver, *Tibbals v. Sergeant*, 1 *McCart*. 449. And of a motion to dismiss because an appeal does not lie, *National Bank of the Metropolis v. Sprague*, 6 *C. E. Gr.* 458. Whether notice of an application for an injunction shall be given, depends on no settled practice, but on the nature of each case. *Buckley v. Corse*, *Sax*. 504. See *RULE 41. Sinnickson v. Johnson*, 2 *Gr. Ch.* 374.

(c) As to the power of the court to restrain waste by injunction, see *Southard v. Morris Canal Co.*, *Sax*. 518. *Scudder v. Trenton Delaware Falls Co.*, *Sax*. 694. A mortgagee in possession may be restrained, *Youle v. Richards*, *Sax*. 534. Or a mortgagor, *Enmons v. Hinderer*, 9 *C. E. Gr.* 39. *Coggill v. Millburn Land Co.*, 10 *C. E. Gr.* 87. See *Brick v. Getsinger*, 1 *Hal. Ch.* 391. The ordinary use of the premises by the mortgagor will not be restrained, as cutting wood for the use of a furnace, *Den v. Kinney*, 2 *South.* *552; or working mines already opened on the premises, *Cupner v. Flemington Mining Co.*, 2 *Gr. Ch.* 467; or quarries, *Vervalen v. Older*, 4 *Hal. Ch.* 98. Equity will not enjoin a suit at law for waste, *Van Syckel v. Emery*, 3 *C. E. Gr.* 387. Even after a sale of the premises under a foreclosure, *Phœnia v. Clark*, 2 *Hal. Ch.* 447. Where defendant having been enjoined as to cutting certain timber on the premises described in the bill, attempted to justify himself on the ground that the cutting, if any, was done on a tract of land not included in the bill, but the proof was unsatisfactory, an attachment issued, *Richards v. West*, 2 *Gr. Ch.* 456. In a bill filed to

restrain waste, complainant's title need not be set out at length, *Shreve v. Black*, 3 *Gr. Ch.* 177. See *Famwinkle v. Curtis*, 2 *Gr. Ch.* 422. To effect a regular service of an injunction the writ itself, under the seal of the court, must be shown to the party against whom it issues, and a true copy thereof delivered to him. Personal service will be dispensed with where the party is out of the state or cannot be found, *Haring v. Kauffman*, 2 *Beas.* 3.7. An error of judgment, in a matter far from being apparent, is not such a violation of an explicit order as ought to subject a party to attachment. In cases of doubt it will be referred to a master to ascertain and report before the attachment issues, *Newark Plank Road Co. v. Elmer*, 1 *Stock*. 755. Nor where there is no intention to commit a breach, although the act of the party is literally a breach, *Fras v. Baviement*, 10 *C. E. Gr.* 84. Advice of counsel is no justification, *Fitzgerald v. Christl*, 5 *C. E. Gr.* 90. *McKillop v. Taylor*, 10 *C. E. Gr.* 39. That the injury complained of was done before the service of the injunction on defendant, and that his acts since then have done complainant no further injury, will not, when those acts were intended to make the injury complete, and the obvious intention of the injunction was to prohibit defendant from continuing the injury, relieve him, *Thropp v. Field*, 10 *C. E. Gr.* 166. A party under an attachment is not confined to his answers to the interrogatories exhibited to him, but may examine witnesses to exculpate himself, *Muggeniss v. Parkhurst*, 3 *Gr. Ch.* 433. See *The State v. Fisher*, 1 *Hal.* 305. While a party is in contempt for disobedience to an injunction he cannot properly have a hearing on a motion for its dissolution, but when the nature and extent of the punishment to be inflicted for such contempt depend on the determination of the question whether the injunction shall be continued or not, the hearing may be allowed, *Endicott v. Matthias*, 1 *Stock*. 110.

(d) A plaintiff or creditor in attachment may file a creditor's bill, *Hunt v. Field*, 1 *Stock*. 36. *Williams v. Michener*, 3 *Stock*. 520. *Robert v. Hodges*, 1 *C. E. Gr.* 300. *Curry v. Glass*, 10 *C. E. Gr.* 108. *Melville v. Brown*, 1 *Harr.* 364. Or a creditor by judgment in the circuit court of the U. S. for N. J., or his assignee, *Vanderveer v. Stryker*, 4 *Hal. Ch.* 175. But not a creditor at large before judgment, *Oakley v. Bund*, 1 *McCart*. 178. *Withright v. Smith*, 2 *C. E. Gr.* 259. *Holdrege v. Guymne*, 3 *C. E. Gr.* 26. *Deveney v. Mahoney*, 8 *C. E. Gr.* 247. Can a creditor

when such trust had been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself.(a)

89. That the court shall have power to compel such discovery, and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgment, out of any personal property, money, or thing in action belonging to the defendant, or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery; *provided*, that if the personal property, money, or thing in action, which shall be discovered as aforesaid, does not amount to the sum of one hundred dollars, no costs shall be recovered by the plaintiff against the defendant in such proceeding.

Power to compel discovery.

90. That when a bill is filed for the purpose aforesaid, and shall be duly verified by the oath of the complainant therein, or his solicitor or agent, that he believes the contents thereof are true, it shall be lawful for the chancellor, in term time or vacation, forthwith to make an order requiring the judgment debtor to appear, and make discovery on oath concerning his property and things in action, before a master in said court, to be designated in said order, at a time and place in said order to be specified.

Debtor may be examined.

P. L. 1864, p. 704.

91. That if it shall appear by said bill, or by one supplemental thereto, and by proof by the oath of the complainant, or that of any other person, that any person owes the said judgment debtor, otherwise than for his labor or personal services, or for the labor or services of any member of his family, or holds money or property in possession or action, in trust for him or for his use, except such property as is now reserved by law, or when such trust has been created by, or the fund so held in trust has proceeded from some person other than the debtor himself, it shall be lawful for the chancellor to make an order forbidding the payment of such debt, or the transfer of said property or money by or to the said debtor, until further order to be by him made.

Order to prevent transfer of the debtor's property-

Ib.

92. That witnesses may be required to appear and testify concerning said matters, by either party, by *subpena ad testificandum*, issued out of said court of chancery, and the said master may adjourn the said examination from time to time, at the instance of either party.

Witnesses.

Ib.

93. That the said examination of said debtor and witnesses shall be certified by said master to the said court of chancery, and thereupon it shall be lawful for the said chancellor to appoint a receiver, *pendente lite*, of the property and things in action belonging or due to or held in trust for said debtor as aforesaid, who thereby shall receive authority to possess, receive and in his own name, as such receiver, sue for such property or things in action; and the said chancellor may order said judgment debtor to convey and deliver to such receiver all such property and rights in action and the evidence thereof; and said receiver shall in all respects be subject to the authority of the said chancellor, in accordance with the practice of the said court, and shall and may dispose of the said property and things in action in conformity with the final decree in said cause.(b)

When receiver, pendente lite, appointed.

Ib.

94. That either party, on the final hearing of said cause, may use his own deposition and that of the opposite party, or either of them, and the

Depositions may be used at final hearing.

at large unite in a bill with a judgment creditor? *Fleischman v. Young*, 1 Stock. 622. If the creditor seek aid against the real estate of the debtor, he must show a judgment at law creating a lien on such real estate; and if he seek aid against the personal estate, he must show an execution giving him a lien on the debtor's goods and chattels. *Disborough v. Outcalt*, Sax. 299. *Young v. Frier*, 1 Stock. 465. *Doughly v. King*, 2 Stock. 396. *Dunman v. Cox*, 2 Stock. 437. *Swayze v. Swayze*, 1 Stock. 273. *Green v. Tatum*, 4 C. E. Gr. 105; affirmed on appeal, 4 C. E. Gr. 574; 6 C. E. Gr. 364. So, a party paying an award must exhaust his remedy at law before resorting to equity. *Williams v. Winans*, 7 C. E. Gr. 581. A general creditor having filed a bill and afterwards having recovered a judgment and issued execution, was allowed to file a supplemental bill showing these facts, even after a decree *pro con*. *Edgar v. Clewenger*, 1 Gr. Ch. 254; 2 Gr. Ch. 258, 464. Where three creditors were proceeding against personal property alone, and one of them afterwards obtained a judgment which was a lien on the lands of the debtor, an amendment of the bill to introduce such subsequent judgment was not permitted. *Lore v. Getsinger*, 3 Hal. Ch. 191. Reversed on appeal, 3 Hal. Ch. 639. A purchaser under such judgment may file a creditor's bill. *Smith v. Espy*, 1 Stock. 160. See *Thompson v. Engle*, 3 Gr. Ch. 271. *National Bank v. Sprague*, 6 C. E. Gr. 468. As to the right of the creditor in general, *Cook v. Johnson*, 1 Beas. 52. *Brown v. Fuller*, 2 Beas. 271. *Hecht v. Koegel*, 10 C. E. Gr. 135. All the creditors who unite in the bill or are subsequently admit-

ted, are entitled to be heard and have their liens protected. *Voorhees v. Reford*, 1 McCurt. 156. But in proceeding under this act to collect the debtor's choses in action, no other creditor can be admitted. The relief can be given only to the creditor who pursues the statute. *Whitney v. Robbins*, 2 C. E. Gr. 360. *Annin v. Annin*, 9 C. E. Gr. 184. The return of the sheriff that the defendants are not, either in their partnership name or as individuals, seized or possessed of any estate real or personal, on which he could levy, is sufficient to give complainants a standing in equity. *Randolph v. Daly*, 1 C. E. Gr. 314. A partner's interest in the partnership property may be reached by a creditor's bill filed against him individually. *National Bank v. Sprague*, 5 C. E. Gr. 16. Where A recovered a judgment at law and filed a creditor's bill which was dismissed with costs, the judgment at law cannot be set off against the defendant's costs on the bill. *Brisley v. Jones*, 1 Hal. Ch. 512. Where the judgments of three creditors in a justice's court amounted together to \$103, held that they could unite in a bill to set aside a fraudulent transfer of personal property. *Lore v. Getsinger*, 3 Hal. Ch. 191.

(a) Where an annuity or fund held in trust for the debtor has proceeded from some person other than the debtor, it is exempt. *Frazier v. Barnum*, 4 C. E. Gr. 317. See *Arnwine v. Carroll*, 4 Hal. Ch. 620.

(b) Where a receiver may be appointed. *Fuller v. Taylor*, 2 Hal. Ch. 301. *Whitney v. Robbins*, 2 C. E. Gr. 360.

deposition or depositions of any other witness or witnesses so taken as aforesaid; *provided*, said party so intending to use the same shall file with the clerk of said court, within twenty days after the filing of said deposition in the clerk's office, a written notice of his said intention; and *provided further*, that the said depositions so designated would have been legal evidence in said suit if the same had been taken after issue joined, according to the practice of said court.

XII. General provisions.

Rules may be entered by consent. 95. That all rules, common or special, by consent of the parties or their solicitors, shall be entered of course with the clerk, whether in term time or in vacation.

Amendments. 96. That all amendments shall be made with or without costs, and on such equitable terms as the said court shall direct. (a)

Notice to be taken of the filing of pleadings. 97. That parties to suits in chancery shall take notice, at their peril, of the filing of answers, demurrers, pleas, replications and other pleadings, and of the pronouncing and signing of decrees.

(a) A subpoena may be amended if by mistake it has been ante-dated, *Dinamore v. Westcott*, 10 C. E. Gr. 302.

A bill may be amended as to matter of form as of course at any time before replication filed, *Buckley v. Corse*, Sax. 504. *Bailey v. Stiles*, 2 Gr. Ch. 245. *Codrington v. Mott*, 1 McCart. 430. As to parties, *Henry v. Brown*, 4 Hal. Ch. 245. *Plumley v. Plumley*, 4 Hal. Ch. 511. *Codrington v. Mott*, 1 McCart. 431. *Reed v. Reed*, 1 C. E. Gr. 248. *Seymour v. Long Dock Co.*, 2 C. E. Gr. 169. *Elmer v. Loper*, 10 C. E. Gr. 475. *Harrison v. Rowan*, 4 Wash. C. 202. *Conrad v. Mullison*, 9 C. E. Gr. 68. See *Robinson v. Davis*, 3 Stock. 30. But if the objection be delayed until the final hearing it can not prevail, unless the parties are necessary to the final determination of the cause, *Van Doren v. Robinson*, 1 C. E. Gr. 256. Nor can such parties be added in the Court of Appeals, *New Jersey Franklinite Co. v. Ames*, 1 Beas. 577. *Cutler v. Tuttle*, 4 C. E. Gr. 549. *Berriman v. Graham*, 6 C. E. Gr. 370. *Contra*, *McLaughlin v. Van Keuren*, 6 C. E. Gr. 379. See *Black v. Del. and Rar. Canal Co.*, 9 C. E. Gr. 456. Nor if the non-joinder renders the defendant liable to further litigation, *Voorhees v. Melick*, 10 C. E. Gr. 523. Where a bill is defective for want of proper parties, the appropriate remedy is a demurrer, or an objection at the hearing for want of parties, and not a petition to be admitted to defend the suit, *Melick v. Melick*, 2 C. E. Gr. 156. *Jones v. Winans*, 5 C. E. Gr. 96; or the court may, on its own motion, amend, or stay the proceedings until the amendment be made, *Van Keuren v. McLaughlin*, 6 C. E. Gr. 163, 379. An agreement between the solicitors to amend, there being no amendment actually made, can not avail, *Wilson v. King*, 3 C. E. Gr. 150. A demurrer will lie where the husband is improperly joined with the wife as a party, *Johnson v. Vail*, 1 McCart. 424. *McDermott v. French*, 2 McCart. 78. *Pendleton v. Woodhouse*, 9 C. E. Gr. 347; or it may be assigned as cause for demurrer, *ore tenus*, at the argument although a general demurrer for want of equity be overruled, *Barrett v. Doughty*, 10 C. E. Gr. 379. Another defendant can not demur; the objection can only be made by the parties themselves, *Miller v. Jamieson*, 9 C. E. Gr. 41. A general demurrer will not lie, where the demurrant is a proper although not a necessary party, *Dorshiemer v. Rorback*, 3 C. E. Gr. 46; 10 C. E. Gr. 516. Amendment may be made where there is a misnomer of the complainant, *Hoboken Building Association v. Martin*, 2 Beas. 427. Where collusion between a trustee and his mortgagee was shown, *Henry v. Brown*, 4 Hal. Ch. 245. Where complainant files a bill for a general account and defendant sets up a stated one, *Brown v. Van Dyke*, 4 Hal. Ch. 795. So, an omission made in the bill by inadvertence, *Del. and Rar. Canal Co. v. Rar. and Del. Bay R. R. Co.*, 1 McCart. 443. *McClane v. Shepherd*, 6 C. E. Gr. 76. *Cowart v. Perrine*, 6 C. E. Gr. 101. *Smith v. Axtell*, Sax. 494. To set up the actual contract, although different from the written one between the parties, *Lanning v. Heath*, 10 C. E. Gr. 425. Where the truth was not disclosed by the answer, nor discovered until the evidence was nearly closed, *Howell v. Sebring*, 1 McCart. 84. Even after proof taken, where the defence set up raises a new issue, *Van Ripper v. Claxton*, 1 Stock. 302. Complainant can not raise a new issue by amendment, he must file a supplemental bill, *Seymour v. Long Dock Co.*, 2 C. E. Gr. 170. In order to make the bill correspond with the proofs, *Smith v. Axtell*, Sax. 494. *Davison v. Davison*, 2 Beas. 246. *Seymour v. Long Dock Co.*, 2 C. E. Gr. 170. *Armstrong v. Ross*, 5 C. E. Gr. 110. *Hampton v. Nicholson*, 8 C. E. Gr. 423. So, if complainant wishes to avail himself of a fact alleged in the answer, *Buckley v. Corse*, Sax. 504. *Hoff v. Burd*, 2 C. E. Gr. 201. After a demurrer complainant may amend, *Marsh v. Marsh*, 1 C. E. Gr. 392. After issue joined amendments are discretionary, *Seymour v. Long Dock Co.*, 2 C. E. Gr. 170. The complainant can not dismiss his own bill as to part of the relief prayed for, and proceed with the residue; he must amend, *Camden and Andoy R. R. Co. v. Stewart*, 4 C. E. Gr. 69; nor can he do so after a decree determining the rights of others has been made, *Collins v. Taylor*, 3 Gr. Ch. 163. A second amendment can only be allowed upon an application disclosing its nature and verified by

affidavit showing complainant has not been in laches, *Buckley v. Corse*, Sax. 504. Where three judgment creditors in a justice's court united in a bill against the debtor to set aside a fraudulent transfer of his personal property, and one of them afterwards recovered another judgment which was a lien on the defendant's lands, an amendment to permit such subsequent judgment to be included, was refused, *Love v. Getsinger*, 3 Hal. Ch. 191. On a bill for the specific performance of a contract for the exchange of lands, an amendment charging that the contract was fraudulent, and asking that it be declared void, was denied, *Codrington v. Mott*, 1 McCart. 430. No alteration can be made in the bill on file after it has been sworn to; the amended bill must be engrossed anew and annexed to the original, *RULE 57* and cases cited, see *State Bank v. Reeder*, Hal. Dig. 231. A new subpoena is not necessary where the defendant has not appeared, *Equitable Life Ins. Co. v. Laird*, 9 C. E. Gr. 319. Complainant can not recover the costs of an amendment, although he obtain a decree to recover the costs of suit, *Hal. Dig. 240* § 1, 3. RULES OF CHANCERY, § 108.

An answer may be amended as to matters of form where complainant will not be prejudiced thereby, *Vandervere v. Reading*, 1 Stock. 446. *Huffman v. Hammer*, 2 C. E. Gr. 269; or to bring matters of defence before the court when defendant has been misled by counsel, *Burgin v. Giberson*, 8 C. E. Gr. 403. The amendment can not be allowed for the purpose of raising a new issue, or after the cause has been heard upon the evidence, *Campion v. Kille*, 1 McCart. 229. Nor to set up an inequitable defence, as usury, *Ibid.*, and 2 McCart. 476. *Remer v. Shaw*, 4 Hal. Ch. 355. *Collard v. Smith*, 2 Beas. 43. *Marsh v. Lasher*, 2 Beas. 253. *Vandervere v. Holcomb*, 7 C. E. Gr. 555. *Hill v. Colie*, 10 C. E. Gr. 469. Nor that complainant acted *ultra vires*, *Third Ave. Savings Bank v. Dimock*, 9 C. E. Gr. 26. Nor after the testimony is closed and the cause set down, unless the delay is satisfactorily accounted for, and good reason given, *Smallwood v. Lewin*, 2 Beas. 123. Nor to set up an agreement of which defendant alleges he was ignorant when he released certain goods on which he had a levy, *Bell v. Hall*, 1 Hal. Ch. 49. The amendment must be made on affidavit of the matter to be inserted, *Ibid.*, and by filing a supplemental answer, without altering the original, *Huffman v. Hammer*, 2 C. E. Gr. 269.

A demurrer may be amended, if general, and the party desires to raise a question of form, *Marsh v. Marsh*, 1 C. E. Gr. 392. *Muller v. Jamieson*, 9 C. E. Gr. 41.

A plea may be amended, where in matters of account material averments have been omitted, *Meeker v. Marsh*, Sax. 198. as that the account is just and true, *Driggs v. Garretson*, 10 C. E. Gr. 178.

A decree may be amended, before enrolment, or where taken *pro con.* for the purpose of rectifying mistakes apparent on its face, or where there is a clear case of surprise and merits, *Dorshiemer v. Rorback*, 9 C. E. Gr. 33. *Jarmon v. Wiswall*, 10 C. E. Gr. 68; or if entered by mistake, or procured by fraud, *King v. Ruckman*, 7 C. E. Gr. 551. or by altering the directions as to the manner of selling mortgaged premises, *Equitable Life Society v. Laird*, 9 C. E. Gr. 319, affirmed, 11 C. E. Gr. , or by reducing the amount for which the decree had been taken, by deducting the interest on a mortgage, which had been paid but not credited, *Citizen Ins. Co. v. Britton*, 10 C. E. Gr. 331. Refused where the only allegation was that defendant was unacquainted with the proceedings of the court, *Carpenter v. Muchmore*, 2 McCart. 123; and where he neglected an opportunity to defend himself, *Miller v. Hill*, 3 Stock. 25. If defendant in a foreclosure is not personally liable an amendment rendering him so, will not be allowed, *Embury v. Benjamin*, 9 C. E. Gr. 228, nor to fix a guarantor's liability, when the remedy at law is adequate, *Jarmon v. Wiswall*, 9 C. E. Gr. 267. The amendment must be made by bill of revivor, *Carpenter v. Muchmore*, 2 McCart. 123. *Scott v. Blaine*, Bald. C. C. 287; and on petition and notice, *Jarmon v. Wiswall*, 9 C. E. Gr. 69. RULES OF CHANCERY, § 52-57.

98. That witnesses in the court of chancery shall be allowed the same fees as by law are allowed to witnesses in the supreme court. Fees of witnesses.

99. That the court of chancery may send any matter of law to the supreme court for its opinion to be certified thereon. Reference to Supreme Court.

100. That if any matter of fact shall render the intervention of a jury necessary, then the court of chancery is hereby authorized to direct an issue for the trial of the same in the supreme court.(a) Issue may be tried by jury.

101. That whenever the chancellor shall deem it necessary to call to his assistance the chief justice, or any justice or justices of the supreme court, or one or more of the masters in chancery to advise with, upon the hearing of a cause or an argument, or upon matters of importance, or when any matter shall be referred to any of said officers, pursuant to the general rules of said court, or to any special order or decree in any cause, matter, or proceeding depending therein, the fees for such services shall be proportionate, as nearly as may be, to the actual value of such services, and shall be regulated by the chancellor from time to time. Compensation of officers called in, &c., by Chancellor.
P. L. 1870, p. 43.

102. That it shall and may be lawful for the chancellor to cause any moneys brought into court, to be deposited by the clerk, in his name as clerk of said court, in one of the banks of this state, to the credit of the cause to which it belongs, or to be invested in any public stock of the United States; and the moneys so deposited, or public stock in which it shall be so invested, shall be, from time to time, accounted for, invested, transferred, or re-invested, or otherwise disposed of, as the court shall deem reasonable and proper; and on the resignation, death or removal of the clerk of the said court of chancery, all moneys deposited in either of the said banks by the said clerk, shall be carried to the account of his successor in office, and the said bank shall take notice thereof, and transfer such accounts accordingly; and the chancellor may, from time to time, make such rules and regulations respecting such deposits and investments as to him shall appear just and right, and for the interest of all persons and parties concerned therein.(b) Moneys brought into court to be deposited in bank.

103. That to enforce obedience to the process, rules and orders of the court of chancery, where any person shall be in contempt according to the law, practice or course of the said court, he shall for every such con- Punishment for contempt.

(a) The awarding of an issue rests in the discretion of the court, and should be sparingly exercised, *Trenton Bank v. Woodruff*, 1 Gr. Ch. 118. *Bassett v. Johnson*, 2 Gr. Ch. 417. *Black v. Lamb*, 1 Beas. 108; 2 Beas. 456. *Carlisle v. Cooper*, 6 C. E. Gr. 577. The court decides facts and law, unless there is contradictory evidence, *Miller v. Wack*, Sac. 205. *Hildreth v. Schilling*, 2 Stock. 196. *Carlisle v. Cooper*, 6 C. E. Gr. 577. *Holcomb v. Managers of Bridge Co.*, 1 Stock. 457. Or where neither party has applied for an issue and all the testimony has been taken and submitted, *Denton v. Leddell*, 8 C. E. Gr. 64. The court may refer a disputed question of fact to the decision of a jury, on its own motion, *Black v. Lamb*, 1 Beas. 108. *Carpenter v. Easton and Amboy R. R. Co.*, 9 C. E. Gr. 408. See *Attorney General v. Heiskon*, 3 C. E. Gr. 413. An issue will not be awarded where the amount in controversy is small, *Garwood v. Eldridge*, 1 Gr. Ch. 290. A court of equity, to effect justice, may settle unliquidated damages, *Coster v. Monroe Co.*, 1 Gr. Ch. 467. Or decide whether a lunatic is restored to sanity, *Matter of Rogers*, 1 Hal. Ch. 46. Or determine whether defendant has lowered his dam, *Carlisle v. Cooper*, 3 C. E. Gr. 241; 6 C. E. Gr. 577. Nor is it necessary that a nuisance be first established by a verdict at law before an injunction can issue, *Duncan v. Hayes*, 7 C. E. Gr. 25. *Denton v. Leddell*, 8 C. E. Gr. 64. So, where commissioners to appraise lands taken by a railroad company did not estimate complainant's damage arising from a high embankment, held, that the court could determine the compensation, *Carpenter v. Easton and Amboy R. R. Co.*, 9 C. E. Gr. 249; and the matter was referred to the same commissioners, but the court, being dissatisfied with their report, ordered an issue, *S. C.*, 9 C. E. Gr. 408. An issue was ordered where the value of the premises in question was disputed, *Trenton Bank v. McKelway*, 4 Hal. Ch. 84. So, to ascertain whether an assignment of a mortgage was absolute or conditional, *Fisher v. Porch*, 2 Stock. 243. Proceedings where complainant's title is disputed, *Manners v. Manners*, 1 Gr. Ch. 384. *Obert v. Obert*, 1 Hal. Ch. 397; 2 Stock. 98. *Lucas v. King*, 2 Stock. 277. *Palmer v. Cusperson*, 2 C. E. Gr. 204. *Dewitt v. Ackerman*, 2 C. E. Gr. 215. *Hay v. Estell*, 3 C. E. Gr. 251. *Riverview Cemetery Co. v. Turner*, 9 C. E. Gr. 18. A denial of complainant's right or an adverse user set up, will not entitle defendant to an issue before the allowance of an injunction, *Holsman v. Boiling Spring Co.*, 1 McCart. 335. The trial may be under the direction of the chancellor, either by a feigned issue, or by an action at law brought and prosecuted as he may direct, *Decker v. Caskey*, Sac. 427. He

may order a special jury, *Bassett v. Johnson*, 2 Gr. Ch. 417. Or direct the court to which the issue is sent for trial to disregard the strict rules of law, and although competent testimony has been rejected, illegal evidence admitted, and the judge has misdirected the jury, he is not bound to grant a new trial, *Black v. Lamb*, 1 Beas. 108. *Black v. Shreve*, 2 Beas. 456. Defendant may plead anew, on payment of costs, after a demurrer to the declaration has been overruled, *Johnson ads. Rowan*, 1 Harr. 266. The judge before whom the issue is tried should not only return the *postea*, but also furnish the chancellor with a statement of the trial, containing the general character of the evidence offered, the part objected to, and his decision on those objections, together with his charge to the jury, and the chancellor may call upon him for an additional report, *Bassett v. Johnson*, 1 Gr. Ch. 154. *Trenton Bank v. Rossell*, 1 Gr. Ch. 492. No exception can be taken at *Nisi Prius* to the manner of conducting the trial; it must be made before the chancellor after the return of the cause, *Harrison v. Rowan*, 3 Wash. C. C. 580. Objection to the *form* of the issue can not be made after the trial, *Black v. Lamb*, 1 Beas. 108. The chancellor is not bound by the finding of the jury, unless his judgment approves it, *Coryell v. Managers of Bridge Co.*, 1 Stock. 457. Nor the Court of Appeals, *Freeman v. Staats*, 1 Stock. 816. A new trial of an issue at law may be granted by the chancellor if he is dissatisfied with the evidence, or for other reasons, *Harrison v. Rowan*, 3 Wash. C. C. 580; 4 Wash. C. C. 32. But not if he be satisfied that the verdict is right, although the judge misdirected the jury, *Trenton Bank v. Rossell*, 1 Gr. Ch. 511. The party applying for a new trial can not object that the issue is not broad enough, and that other injuries ought to have been included in it, *Bassett v. Johnson*, 1 Gr. Ch. 154. The party applying for the new trial prepares the case and submits it to the solicitor of the adverse party, and if they can not agree the case must be settled by the judge before whom the issue was tried, *Trenton Bank v. Rossell*, 1 Gr. Ch. 492. Costs do not follow the verdict as of course, but are in the discretion of the court, *Decker v. Caskey*, 2 Gr. Ch. 446. An order, made at the final hearing, for an issue, is appealable, *Newark and New York R. R. Co. v. Mayor &c. of Newark*, 8 C. E. Gr. 515. But a writ of error will not lie to bring up an order for an issue, to determine, in a contest between execution creditors, whether certain judgments were fraudulent, *Tradesmen Bank v. Fairchild*, 3 Vr. 542.

(b) See RULES OF CHANCERY, § 165.

tempt, and before he be released or discharged from the same, pay to the clerk in chancery, for the use of this state, a sum not exceeding fifty dollars, as a fine for the said contempt; and the said person being in court, upon process of contempt or otherwise, shall stand committed and remain in close custody until the said process, rule or order shall be obeyed and performed, and until the fine so imposed for such contempt with the costs, be fully paid.

Clerk to account for fines. 104. That the clerk in chancery shall account, on oath, and pay annually to the treasurer of this state, the fines which he shall have received by virtue of this act.

Costs discretionary. 105. That except where it is otherwise directed by this or some other act of the legislature, it shall be in the discretion of the court of chancery to award costs or not; and the payment of costs, when awarded, may be compelled by writ of *feri facias* or *capias ad satisfaciendum*, issuing out of the said court, or by subpoena and attachment.(a)

Certain proceedings abolished. 106. That subpoena to hear judgment, attachment with proclamations, and commission of rebellion, shall, in all cases in chancery, be deemed unnecessary, and omitted accordingly.

(a) A successful party is entitled to costs. *Hal. Dig.* 240, § 3. *Canmann v. Traphagen*, *Sax.* 230. *Buckley v. Corse*, *Sax.* 505. *Loss v. Oby*, 7 C. E. Gr. 52. But not where the act of the party led to the controversy, and great and unnecessary expense was occasioned by examining numerous witnesses, *Shields v. Arndt*, 3 Gr. Ch. 235. Nor on the foreclosure of a mortgage where more than the legal rate of interest has been exacted and paid, *Pond v. Causdell*, 8 C. E. Gr. 181. Complainant can not have his bill dismissed without costs, unless by consent. *Fisher v. Quick*, 1 Stock, 312. Where parties settle out of court, without any agreement as to costs, neither party is entitled to them, *Bruce v. Gale*, 2 Beas. 211. Where each party is in default each must pay his own costs, *Harrison v. Righler*, 3 Stock, 389. *Smith v. Brown*, 3 Hal. Ch. 526. *Moore v. Vail*, 2 Beas. 298. *Skillman v. Skillman*, 2 McCart. 389. So where each is partially successful, *Fairchild v. Hunt*, 1 McCart. 357. In cases of doubt on questions arising from the construction or probate of wills, costs will be allowed out of the estate, see ORPHANS' COURT § 169, and cases cited, *Craig v. Manning*, 4 Hal. Ch. 806. *Goble v. Grant*, 2 Gr. Ch. 629. *Stackhouse v. Horton*, 2 McCart. 202. *Keeler v. Keeler*, 3 C. E. Gr. 287. *Attorney General v. Moore*, 4 C. E. Gr. 504. *Jacobus v. Jacobus* 5 C. E. Gr. 50. *Munn v. Munn*, 5 C. E. Gr. 472. *Slack v. Bird*, 8 C. E. Gr. 238. *Bateman v. Bateman*, 9 C. E. Gr. 70. *Gulick v. Gulick*, 10 C. E. Gr. 925. But not where the necessity for filing the bill was caused by the misconduct of the party, *Post v. Sterens*, 2 Beas. 293; or the suit is brought in bad faith by complainant, *Shepherd v. McClain*, 3 C. E. Gr. 129; or the orphans' court exceeds its jurisdiction, *Skillman v. Skillman*, 2 McCart. 289. So where the construction sought for was against the obvious intent of the testator, *Ely v. Ely*, 5 C. E. Gr. 44; or where the contestants continue the litigation unreasonably, *Collins v. Twenley*, 6 C. E. Gr. 353; and where the bill was filed for the recovery of an estate and the will had been made under the undue influence of complainant, *Lynch v. Clements*, 9 C. E. Gr. 431. Where a second suit is brought for the same cause of action, the proceedings will be stayed until the costs of the first suit are paid, *Sears v. Jackson*, 3 Stock, 45. *Uptyke v. Bartles*, 2 Beas. 281. See *Van Walkenbergh v. Rahway Bank*, 4 Hal. Ch. 560. *Den v. Beacon*, 4 Wash. C. C. 578. Costs will be denied where two suits, as ejectment and an action on a bond, are brought for the same cause. *Onderdonk v. Gray*, 4 C. E. Gr. 69. See *Copperthwaite v. Dummer*, 3 Harr. 258. *Freeman v. Staats*, 4 Hal. Ch. 814. *Conover v. Conover*, *Sax.* 403. Where two mortgages covering the same premises are foreclosed by two separate bills, costs on one only will be allowed, *Demarest v. Berry*, 1 C. E. Gr. 481. The costs of an issue at law are discretionary. *De'any v. Noble*, 2 Gr. Ch. 446. Where complainant is *in laches* he will be charged with costs, *Randall v. Morrell*, 2 C. E. Gr. 343; but not where the party at fault is acting for minors, *Vanduyne v. Vanduyne*, 1 C. E. Gr. 93. Where the construction of a new statute is sought, costs will not be allowed against the appellant, *Gould v. Tingley*, 1 C. E. Gr. 501.

Costs in particular cases.

Abatement, see ABATEMENT, p. 2, note (c).
Alimony, *Miller v. Miller*, *Sax.* 387. *Ballentine v. Ballentine*, 1 Hal. Ch. 519. *Snover v. Snover*, 2 Stock, 261; 2 Beas. 261. *Anshutz v. Anshutz*, 1 C. E. Gr. 162. *Cory v. Cory*, 3 Stock, 400. *Richmond v. Richmond*, 1 Gr. Ch. 90. See *Calame v. Calame*, 10 C. E. Gr. 548.
Amendment, *Hal. Dig.* 240, § 1, 5.
Assistance, writ of, *Yameter v. Borden*, 10 C. E. Gr. 414.
Attachment for contempt, *Mageniss v. Parkhurst*, 3 Gr. Ch. 433. See *McDermott ads. State*, 5 Hal. 63.
Decree, opening, *Emery v. Downing*, 2 Beas. 59. *Oram v. Dennison*, 2 Beas. 438.
Demurrer, *Andrews v. Ford*, 2 Hal. Ch. 489. *Hicks v. Campbell*, 4 C. E. Gr. 184.
Dower, where title is disputed, *Palmer v. Casperson*, 2 C. E. Gr. 207.
Execution, motion to set aside, *McPherson v. Housel*, 2 Beas. 209.

Executors not to pay, *Gifford v. Thorn*, 1 Stock, 702. *Shepherd v. McClain*, 3 C. E. Gr. 128. *Norcross v. Boulton*, 1 Harr. 310. *Slack v. Bird*, 8 C. E. Gr. 238. Except where they have been grossly negligent, *Egerton v. Egerton*, 2 C. E. Gr. 420. *Lerch v. Oberly*, 3 C. E. Gr. 581. See ORPHANS' COURT, § 115 and cases cited.

Fees, counsel, allowed.

(1) On application for alimony, *Paterson v. Paterson*, 1 Hal. Ch. 389. *Anthony v. Anthony*, 3 Stock, 70. *Vreeland v. Jacobus*, 4 C. E. Gr. 233. When denied, *Ballentine v. Ballentine*, 1 Hal. Ch. 471. *Dougherty v. Dougherty*, 4 Hal. Ch. 540. *McEwen v. McEwen*, 2 Stock, 286. *Vreeland v. Vreeland*, 3 C. E. Gr. 43.

(2) Divorce, *Amos v. Amos*, 3 Gr. Ch. 171. *Marker v. Marker*, 3 Stock, 257. *Clare v. Clare*, 4 C. E. Gr. 41. When denied, *Begbie v. Begbie*, 3 Hal. Ch. 100.

(3) Executors, *Whitemack v. Stryker*, 1 Gr. Ch. 9. *King v. Berry*, 2 Gr. Ch. 261. *Day v. Day*, 2 Gr. Ch. 550. *Stackhouse v. Horton*, 2 McCart. 232. *Jacobus v. Jacobus*, 5 C. E. Gr. 50. *Felt v. Vanatta*, 6 C. E. Gr. 87. When denied, *Pursel v. Pursel*, 1 McCart. 516. See *Halsted v. Meeker*, 3 C. E. Gr. 141.

(4) Guardian, *Burnham v. Dalling*, 3 C. E. Gr. 135. When denied, *Runkle v. Gale*, 3 Hal. Ch. 101.

(5) Partition, *Coles v. Coles*, 2 Beas. 365.

(6) Trustee, denied, *Holcombe v. Holcombe*, 2 Beas. 415.

Guardian must pay when he fails to account, *Burnham v. Dalling*, 1 C. E. Gr. 310.

Lunacy, *Matter of White*, 2 C. E. Gr. 274. See *Conover v. Conover*, 3 Gr. 420.

Mortgagor, ante, § 71, note (a) Where personally liable, *Danbury v. Robinson*, 1 McCart. 324. See *Hanford v. Bockee*, 5 C. E. Gr. 102. See *Redeem*, *infra*.

Nuisance, *Butler v. Rogers*, 1 Stock 487. *Wolcott v. Melick*, 3 Stock, 215. *King v. Morris and Essex R. R. Co.*, 3 C. E. Gr. 400. *Allen v. Freeholders of Monmouth*, 2 Beas. 75. *Zabriskie v. Jersey City R. R. Co.*, 2 Beas. 319. *Hinchman v. Paterson Horse R. R. Co.*, 2 C. E. Gr. 83. *Attorney General v. Brown*, 9 C. E. Gr. 94. When denied, *Cross v. Mayor of Morristown*, 3 C. E. Gr. 315. *Morris Canal Co. v. Fagin*, 7 C. E. Gr. 438. *Easton v. New York and Long Branch R. R. Co.*, 9 C. E. Gr. 59. When to abide event, *Cleveland v. Citizens Gas Light Co.*, 5 C. E. Gr. 202. *Manhattan Co. v. Van Keuren*, 8 C. E. Gr. 257.

Officers, selling real estate, when grossly negligent, *Johnson v. Garrett*, 1 C. E. Gr. 31.

Partition, *Coles v. Coles*, 2 Beas. 365. *Hall v. Piddock*, 6 C. E. Gr. 312.

Payment of money into court, *State Bank v. Holcomb*, 2 Hal. 193. See *Earle v. Earle*, 1 Harr. 273. *McTighe v. Dean*, 3 C. E. Gr. 81. See *Tender*, *infra*.

Printing the case, disallowed, *Decamp v. Crane*, 6 C. E. Gr. 544.

Receiver, motion for a, *Sutro v. Wagner*, 8 C. E. Gr. 388; 9 C. E. Gr. 589. Settlement of accounts of, *Richards v. Morris Canal Co.*, 3 Gr. Ch. 428.

Redeem, bill to, *Hill v. White*, *Sax.* 435. *Burlew v. Hillman*, 1 C. E. Gr. 23. *Phillips v. Huisizer*, 5 C. E. Gr. 309. When denied, *Lozear v. Shields*, 8 C. E. Gr. 509. *Melick v. Creamer*, 10 C. E. Gr. 429. See ante § 71, note (a).

Tender, after, *Hill v. White*, *Sax.* 435. *Woodruff v. Depue*, 1 McCart. 169. *Thorne v. Mosher*, 5 C. E. Gr. 257. *Stockton v. Dundee Co.*, 7 C. E. Gr. 56. *Shields v. Lozear*, 7 C. E. Gr. 447. Trustees, when to pay, *Warbass v. Armstrong*, 2 Stock, 263. *Frey v. Frey*, 2 C. E. Gr. 72. *Lathrop v. Smalley*, 8 C. E. Gr. 192. See *Slack v. Bird*, 8 C. E. Gr. 238.

Costs may be re-taxed on motion, *Andrews v. Ford*, 2 Hal. Ch. 488. Execution for costs does not issue as of course, the party must have an express order, *Hal. Dig.* 241, § 13. An appeal will lie for a matter of order, *Norcross v. Boulton*, 1 Harr. 310. *Den. Rutherford v. Fen*, 1 Zab. 700. *State v. Browning*, 4 Dutch. 556. See *Lozear v. Shields*, 8 C. E. Gr. 509. See RULES OF CHANCERY, § 104-112.

107. That the office of register in the court of chancery be, and it is hereby abolished. Officer of register abolished.

108. That it shall not be necessary for the clerk in chancery to register any rule, order or decree, or any master's report, that may be made in any cause or proceeding depending or hereafter to be brought or prosecuted in the said court of chancery; nor shall any fees be allowed or taxed for registering any such rule, order, decree or report. Certain rules, &c. not to be registered.

109. That it shall be the duty of the chancellor, from time to time, to make such rules and orders to regulate pleadings and practice in the court of chancery, as may, in his judgment, render the practice and proceedings therein more efficient, expeditious and simple, and prevent unnecessary cost and delay, and that, for that purpose, he shall have full power to change and regulate such pleadings and practice. Chancellor to make rules.
P. L. 1852, p. 256.

110. That execution may issue, without a revival of the decree, at any time within twenty years from the date of such decree; *provided*, the parties to the decree, or those of them during whose lives execution may now issue without a revival, be then living; *and provided further*, that if more than six years have elapsed since the entering of the decree, a special order of the court shall be necessary before the execution issue to be made upon ten days' notice to the defendant of the application therefor, and proof to the satisfaction of the court of the amount remaining due upon the decree. Executions may issue without revival of decree.
P. L. 1855, p. 288.

111. That in case of the sickness of the chancellor or his temporary absence from the state, he may, by order filed with the clerk, authorize such master in chancery as may be therein named for that purpose, to grant and dissolve injunctions, and perform such other duties of the chancellor as may be therein designated, not including the final hearing and determination of causes; and all orders and acts of such master within the scope of such authority, shall have the same force and effect as if made and done by the chancellor in person. Injunction masters, during absence of chancellor.
P. L. 1867, p. 166.

112. That in all cases where property is or shall be held in trust in another state, and any of the *cestuis que trust* for whose benefit said property is or shall be so held in trust reside in this state and desire the transfer of such trust property to this state, the chancellor may, upon petition presented to him for that purpose, and upon ten days' notice of the time of presenting said petition having been given to all persons having a beneficial interest in the estate so held in trust, appoint a trustee for the purpose of receiving, holding and managing all such trust property as may be transferred from such other state in accordance with the laws thereof; and such trustee when so appointed, first having executed a bond to the chancellor in such an amount, and with such surety or sureties as the said chancellor shall approve of, conditioned for the faithful execution of the trust, shall have all the powers and privileges and be subject to all the liabilities incident to the original trust. Chancellor may appoint trustee for receiving and managing trust property in certain cases.
P. L. 1873, p. 14.

113. That hereafter in all suits and proceedings in the court of chancery, instead of the retaining fee now allowed to counsel by statute, it shall be lawful for the chancellor on final decree to allow and order paid to the counsel in the cause such sum as the chancellor may consider justly warranted by the interests involved in the litigation and the services rendered, which allowance shall be included in the bill of taxed costs and collected with the other items of said bill in the same manner that the retaining fee has been heretofore; and the retaining fee now allowed to counsel by statute shall not hereafter be allowed in the cases herein provided for. (See *Sec. 122.*) Chancellor may allow counsel fee instead of retaining fee in taxed bill of costs.
P. L. 1873, p. 116.

XIII. Appeal.

114. That all persons aggrieved by any order or decree of the court of chancery, may appeal from the same, or any part thereof, to the court of errors and appeals;(a) and all appeals, except from final decrees, shall Appeal; in what cases and when brought.

(a) An appeal lies from an order dissolving an injunction, *Chegary v. Schofield*, 1 Hal. Ch. 525. *Doughty v. Somerville and Easton R. R. Co.* 3 Hal. Ch. 629. *Morgan v. Rose*, 7 C. E. Gr. 584. *Bluck v. Del. and Raritan Canal Co.*, 9 C. E. Gr. 477. But not from the granting of a temporary injunction during the pendency of the cause, *Att'y Gen. v. City of Paterson*, 1 Stock. 625. The chancellor or court of appeals may order the proceedings, after the appeal to be stayed, or the injunction continued, *Chegary v. Schofield*, and *Doughty v. Somerville and Easton R. R. Co.*, *supra*, *Ryerson v. Boorman*, 3 Hal. Ch. 640. *Mayor of Jersey City v. Morris Canal Co.* 1 Beas. 645. An order, made at the final hearing, for an issue to be tried by a jury, is appealable, *Newark and New York R. R. Co. v. The Mayor &c. of Newark*, 8 C. E. Gr. 515. But see *Black v.*

P. L. 1873, p. 123. be made within forty days after filing the order or decree appealed from; and all appeals from final decrees in the said court shall be made within three years after making such decree; unless a notice of *lis pendens* has, in the manner hereinbefore provided for, been filed in the county clerk's office, in which cases all appeals from final decrees shall be made within three months after filing the decree appealed from; *provided*, that in cases where the person entitled to such appeal from any final decree be an infant, *feme covert*, or insane, he shall have three years to bring such appeal, after such disability shall be removed.

XIV. Vice chancellor, his duties and powers.

Vice Chancellor, how appointed. 115. That there shall be a vice chancellor, who shall be a counsellor-at-law of at least ten years' standing, who shall be appointed by the chancellor, and commissioned by the governor, under the great seal of the state, and who shall continue in office for seven years from the date of the commission.

Term of office. P. L. 1871, p. 127.

Powers and duties. 116. That the chancellor may refer to such vice chancellor, any cause or other matter which at any time may be pending in the court of chancery, to hear the same for the chancellor, and to report thereon to him and advise what order or decree should be made therein; and any matter or cause in which the chancellor is interested may be so referred.

Powers and duties. 117. That when any cause or matter shall be so referred to such vice chancellor, it shall be lawful for him to take and hear the evidence of any or all witnesses in said cause or matter orally, in the same manner as the evidence is now taken and heard in the several courts of law in this state on trials before a jury; and if a report of the evidence so taken before him shall become necessary in the progress of said cause, for use on appeal from the decree of the chancellor thereon or otherwise, then such vice chancellor shall settle and sign such report.

May employ reporter. 118. That it shall be lawful for such vice chancellor when any cause or matter is so referred, to employ a competent stenographic reporter to take down the evidence of such witnesses as may be examined before him, for the use of the court and the parties in the cause or matter; and to fix, allow, and tax the fees and compensation of such reporter for taking down and writing out such evidence, and to apportion the same between the parties in the same manner as the fees of examiners are apportioned; and each party shall forthwith pay the part so apportioned to him, which shall be part of the taxable costs in the cause.

Fix compensation and apportion same. 119. That it shall be lawful for the chancellor, from time to time, to divide the state into convenient districts, and appoint times and places for the sitting of said vice chancellor for the hearing of causes and matters referred to him, and to make all such general rules for the effectual execution and carrying out of this act as he shall deem necessary and proper.

Chancellor may divide the state into districts. 120. That said vice chancellor shall not engage in the practice of law as counsel or otherwise, in any of the courts of this state, and shall receive as a compensation for the performance of the duties imposed upon him by this act, an annual salary of five thousand dollars, to be paid quarterly, and also ten dollars for every day actually engaged in the performance of

Shall not practice law.

Salary.

Lamb, 1 *Beas.* 108; 2 *Beas.* 456. *Tradesmens Bank v. Fairchild*, 3 *Vr.* 542. A decree between co-defendants, in which complainant has no interest, may be appealed from, *Vanderveer v. Holcomb*, 2 *C. E. Gr.* 547. So, an order refusing to set aside a sale, upon an application based on the illegality of such sale, *National Bank of the Metropolis v. Sprague*, 6 *C. E. Gr.* 456. *Smith v. Alton*, 7 *C. E. Gr.* 572. So, an order sustaining exceptions to a bill for impertinence, *Camden and Amboy R. E. Co. v. Stewart*, 6 *C. E. Gr.* 484. So, where complainant is entitled to an equitable answer, if defendant be permitted to set up usury without offering to pay the sum actually due, *Vanderveer v. Holcomb*, 7 *C. E. Gr.* 555. So a decree which settles permanently the right to the custody of infants, *State, Baird v. Torrey*, 4 *C. Gr.* 481; 6 *C. E. Gr.* 384. So an order appointing a receiver, *Weissenborn v. Sieghortner*, 6 *C. E. Gr.* 483. But not an order authorizing a receiver, instead of collecting the rents, to permit the defendant to do it, *Garr v. Hill*, 1 *Hal. Ch.* 639. If a mortgagor be made a party to a foreclosure after disposing of his equity of redemption, and sets up usury, he has a right to appeal from an decree against him, because the decree would bar him from setting up usury to a suit on the bond, *Andrews v. Stelle*, 7 *C. E. Gr.* 478. An order directing process to bring

in the parties to answer for an alleged contempt, can not be appealed from, *Coryell v. Holcomb*, 1 *Stock.* 650. Nor a decree which does not dispose of the whole merits of the case, *Newark Plank Road Co. v. Elmer*, 1 *Stock.* 755. Nor an order refusing to order a special guardian to pay over the money derived from a sale of the minor's land, to a general guardian, *Matter of Anderson*, 2 *C. E. Gr.* 536. Where a final decree involves the merits of the case, which had previously been settled by an interlocutory order, an appeal from the final decree brings the whole case before the court *Terhune v. Colton*, 1 *Beas.* 312. *Crane v. Decamp*, 7 *C. E. Gr.* 614. But an order refusing to allow an answer to be amended, could not be included in an appeal from such interlocutory decree, *Butterfield v. Third Ave. Savings Bank*, 10 *C. E. Gr.* 533. After the death of a party his representatives may revive the suit for the purpose of appealing, *Peer v. Cookerow*, 2 *Beas.* 136. Where a joint decree has been rendered against a married woman and other parties, she can appeal and carry up the whole case for review, after her disability is removed, although the right of appeal may have been lost by the others, *Peer v. Cookerow*, 1 *McCart.* 361. An appeal may be sustained in part and dismissed as to the residue, *Westcott v. Bradford*, 4 *Wash. C. C.* 493.

such duties, to be ascertained and certified by the chancellor, and to be paid by the treasurer of the state with said salary quarterly.

Supplement.

Approved April 9, 1875. P. L. 1875. p. 100.

121. SEC. 1. That section seventy-nine of the act entitled "An act respecting the court of chancery," approved March twenty-seventh, one thousand eight hundred and seventy-four, be amended by inserting after the words "provided however" and before the word "that," the following words: "that the person making such search shall certify on the same the amount of such expenses paid or incurred; and provided also."

Persons making search shall certify on same amount of expenses paid or incurred.

122. SEC. 2. That section one hundred and thirteen of the act entitled "An act respecting the court of chancery," approved March twenty-seventh, one thousand eight hundred and seventy-four, be amended by inserting after the word "sum" and before the word "as," the following words: "not less than one nor more than five per centum of the amount of such decree."

Chancellor may allow per centage on amount of decree as counsel fee.

Chosen Freeholders.

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| 1. Incorporation and names of boards. | 25. Duty and liability of township collector and constable |
| 2. General powers. | 26. County collector to pay to order of corporation. |
| 3. Process, how served on. | 27. Penalty for neglect or refusal. |
| 4. May raise money, for what. | 28. County collectors' fees. |
| 5. May adjourn from time to time. | 29. Further duties of justices and constables. |
| 6. Annual meeting fixed. | 30. Poor-houses. |
| 7. A director to be elected. | 31. By whom governed and regulated. |
| 8. Clerk, compensation and duties. | 32. Poor, support and employment of. |
| 9. Clerk to deliver papers, etc., to his successor. | 33. Two counties may have one poor-house. |
| 10. Special meetings convened, where held. | 34. Jointly procure materials— |
| 11. Penalty for non-attendance. | 35. And apportion expense. |
| 12. How money assessed and raised. | 36. Compensation of chosen freeholders. |
| 13. How, when tax required to be raised at different times. | 37. Term "township" construed. |
| 14. Appeal from assessment. | 38. Term of freeholders' office. |
| 15. Proceedings against delinquents. | 39. Lands, etc., vested in the board. |
| 16. Proof of demand required. | 40. Less than quorum may adjourn. |
| 17. How justice to proceed. | 41. Power to sell and convey. |
| 18. How process to be executed. | 42. When township may erect poor-house. Exempt from other poor tax. |
| 19. Election and bond of county collector. | 43. Publication of annual statement. |
| 20. Vacancy may be supplied. | 44. What annual statement to embrace. |
| 21. Officers to account and remedy against. | 45. When clerk to cause statement to be published. Penalty for neglect. |
| 22. Liability of county collector. | 46. Special meetings, how convened. |
| 23. When taxes collected to be paid. | |
| 24. When township responsible for money lost. | |

An act to incorporate the chosen freeholders in the respective counties of the state.

Approved April 16, 1846. R. S. 182.

1. The chosen freeholders of the several townships, precincts and wards in the respective counties of this state, and their successors, shall be and they are hereby constituted a body politic and corporate in law by the following names, that is to say: that the said freeholders in and for the county of Bergen, shall be styled and known by the name of "The board of chosen freeholders of the county of Bergen," (the corporate name of the freeholders in the other counties of the state is precisely the same, substituting in each case the name of the proper county.)

Incorporation and names of boards.

2. That the said boards of chosen freeholders in and for their respective counties, and their successors, shall be able and capable to acquire, purchase, receive, have and hold any lands, tenements, hereditaments, goods and chattels in trust to and for the use of their said counties respectively, (a)

Powers.

(a) The title to public bridges built by the county, is vested in the board of chosen freeholders, *Freeholders of Monmouth v. Red Bank Turnpike Co.*, 3 C. E. Gr. 91. But no action will lie against them for an injury arising from a defect in such bridge, *Freeholders of Sussex v. Strader*, 3

Harr. 108, ante, BRIDGES, § 1, note (a). Money raised illegally from tavern licenses does not belong to the board, *Freeholders of Essex v. Barber*, 2 Hal. 64. See *Evans v. City of Trenton*, 4 Zab. 764.