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P. L. 1845, p. 921.
" 1851, p. 317.
" 1852, p. 256.
" 1855, p. 55.
" 1859, p. 82.
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" 1869, p. 1033.
" 1870, p. 40, 42.
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" 1871, p. 127.
" 1873, p. 14, 48, 68, 116, 123.

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I. The court when open.

An act respecting the court of chancery.

Revision—Approved March 27, 1875.

Terms of court.

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. (*a*)

Term lost, suits, &c., continued.

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.

Court always open for certain purposes.
P. L. 1852, p. 256.

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

(*a*) See RULES OF CHANCERY, Sec. 1.

granted in vacation, and for the return of writs of subpœna 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. (*a*)

Final decrees in vacation. P. L. 1852, p. 256.

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. (*b*)

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

Bill to be first filed.

5. That no subpœna 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. (*c*)

Process indorsed, signed and sealed.

6. That every subpœna, 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 indorsed with the name of the said solicitor or party, and also signed and sealed by the said clerk.

Names in one process.

7. That the names of all defendants in any suit, who are resident in the same county, shall be inserted in one subpœna or process. (*d*)

Notice to be added to subpœna. P. L. 1867, p. 166.

8. That to every subpœna 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 defense, it is only necessary for him to answer, plead, or demur to the bill within the time required by law. (*e*)

When ticket to issue.

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 subpœna to be issued against such other defendant, cause to be issued a ticket in writing, shortly making known for what cause he is subpœnaed to answer; which ticket shall be, by the officer serving the subpœna, left with the said defendant at the time of such service, and no charge be made therefor.

Proceedings when christian name of married woman cannot be ascertained. Ib.

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.

Married woman may appear and plead, &c. P. L. 1873, p. 68.

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.

Proceedings to be valid and binding. Ib.

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.

13. [This section amended by Sec. 136, *post.*]

(*a*) The fact that a subpœna *ad respondendum* is returnable on a legal holiday is not ground for setting it aside. *Kinney* v. *Emery*, 10 *Stew.* 344. A writ of *ne exeat* may be granted on affidavits made before a suit is pending in court between the parties. *Clark* v. *Clark*, 6 *Dick.* 404.

(*b*) See RULES OF CHANCERY, Secs. 21-24, 27, 60, 166.

(*c*) If the issuing of the subpœna 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 subpœna, when in fact it was not issued before filing the bill, may be corrected. *Dinsmore* v. *Westcott*, 10 *C. E. Gr.* 302.

(*d*) See RULES OF CHANCERY, Secs. 51, 52.

(*e*) See *Kinney* v. *Emery*, 10 *Stew.* 339.

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 subpœna, 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 subpœna 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 subpœna 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 subpœna.

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 from this state; (*c*) and, if granted, the chancellor, vice chancellor, or an injunction master, shall direct to be indorsed thereon the sum in which the party shall give bond, with surety or sureties, being freeholders in this state. (*d*) Ne exeat

17. [This section amended by Secs. 135, 155 and 167, *post.*]

III. Proceedings against non-residents.

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18. [This section amended by Sec. 172, *post.*]

19. [This section amended by Sec. 173, *post.*]

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. Ib.

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 Enforcing decree against absent defendant.

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(*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 subpœna has not been served, the sheriff's return to the subpœna is conclusive, and cannot 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 subpœna, is presumptive proof of the service of the notice required by the 38th rule. *Bell* v. *Gilmore*, 10 *C. E. Gr.* 104. *Mulford* v. *Reilly*, 5 *Stew.* 419. A subpœna was inadvertently made returnable on Sunday. It was duly served ten days before the return day, and no answer filed or appearance entered. Held, that the return day could be amended, so as to make it returnable the following Monday. *McEvoy* v. *Trustees*, 11 *Stew.* 420.

(*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.

(*c*) 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. *Byland* v. *Byland*, 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. *Kirrigan* v. *Kirrigan*, 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. *Ib.* 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. *Ib.* Application to discharge the writ must be made before the cause is noticed for final hearing. *Miller* v. *Miller*, *Sax.* 386. A defendant arrested, and in custody under a *ne exeat*, may, before answer, apply for the discharge of the writ on affidavits. *Cary* v. *Cary*, 12 *Stew.* 3. As to statements of defendant affording sufficient ground to issue a *ne exeat*, see *Cary* v. *Cary*, 12 *Stew.* 20. See Rule 192.

(*d*) Writ of *ne exeat* declared void for service on Sunday, and bond given thereon ordered to be canceled. *Jewett, Receiver* v. *Bowman*, 12 *C. E. Gr.* 275.

Chancellor may require bond, or sequestration may be ordered.

Time within which defendant may have relief.

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; (*a*) 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 notwithstanding; 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.

May file bill.

When decree confirmed.

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 subpœna, 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 subpœna.

Bill may call for answer without oath. P. L. 1867, p. 166. Amended.

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; (*b*) 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 com-

(*a*) An absent defendant has a right, on showing a meritorious defense, to an order permitting him to appear and answer the complainant's bill, provided he makes his application within the time limited by this section. *Consolidated Electric Storage Co.* v. *Atlantic Trust Co.*, 5 *Dick.* 93.

(*b*) 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.

pelled 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. (*a*)

24. [This section amended by Sec. 174, *post.*]

25. [This section amended by Sec. 175, *post.*]

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

Affidavit and certificate to plea or demurrer.

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.

Decree pro confesso in term or vacation.

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. (*b*)

Issue on plea.

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. (*c*)

(*a*) 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. Where the bill calls for an answer under oath, and it is given directly responsive to the bill, the burden is cast on the complainant to prove the charge in his bill by more than one witness, or by the evidence of one witness corroborated by facts and circumstances equivalent to another witness. But where the defendant does not rely on his answer alone, but offers himself as a witness, he refutes himself by his own evidence, and circumstances added may overcome the answer. *Morris* v. *White*, 9 *Stew.* 324.

(*b*) 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 defense, 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 27. If the defendants obtain further time to answer, they cannot set up an inequitable defense, 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. *Cole*, 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 open 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 defense is meritorious, and the party has not been heard, through mistake, accident or surprise. *Embury* v. *Bergammi*, 9 *C. E. Gr.* 228. But not if he has had an opportunity of making his defense and neglected it. *Miller* v. *Hild*, 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. *Lasher*, 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. Nor, where a sheriff returns a subpœna "served," upon an affidavit of defendant not denying that he was served with a ticket, but merely asserting that he was served with an ordinary subpœna. *Mulford* v. *Reilly*, 5 *Stew.* 419. A decree so made may be opened at any subsequent time to prevent fraud or mistake. *Consolidated Electric Storage Co.* v. *Atlantic Trust Co.*, 5 *Dick.* 93.

(*c*) 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 offense. *Meeker* v. *Marsh*, *Sax.* 198. *Davison* v. *Johnson*, 1 *C. E. Gr.* 112. If defendant has a substantial defense which cannot avail him under his plea from inaccuracy of pleading, he may claim the full benefit of such defense by his answer. *Matthews* v. *Roberts*, 1 *Gr. Ch.* 338. See Rules 13, 91.

Demurrer first argued.

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

31. [This section amended by Sec. 176, *post.*]

Costs on plea or demurrer.

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

When exceptions or replication must be filed.

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. (*b*)

Rule to refer exceptions.

Amended.

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. (*c*)

Costs on exceptions.

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. (*d*)

When second answer required.

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. (*e*)

When third answer required, and costs.

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.

Consequences, if insufficient.

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.

Cross-bill and answers.

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. (*g*)

(*a*) 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.

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

(*c*) 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. *Weitling*, 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. *Merceles*, 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. *Ib. Haulenbeck* v. *Cronkright*, 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. *Blauvelt* 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*, 8 *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*, 8 *C. E. Gr.* 131. Exceptions to an answer must be signed by counsel. *Hitchcock* v. *Rhodes*, 15 *Stew.* 495.

(*d*) 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.

(*e*) 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.

(*g*) 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

When cause at issue.

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 subpœna or enter a rule to rejoin in any case.

Person acquiring interest after bill filed may be made a party. P. L. 1870, p. 41.

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 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*)

Parties may be added, either before or after final decree. P. L. 1870, p. 42. Amended.

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.

V. Evidence; interrogatories; examination of witnesses.

Hearing on bill and answer.

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*)

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, cannot 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 defendant cannot by cross-bill litigate matters between himself and another defendant which are not the subject of the suit. *Carpenter* v. *Gray*, 10 *Stew.* 389.

(*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 defense the mortgagor could have set up after a decree. *Hewitt* v. *Montclair Railway Co.*, 10 *C. E. Gr.* 100. A party coming into a case by petition under this section, is no further bound by the previous orders and proceedings in the cause than the party whose interest he has acquired would have been bound. *Guest* v. *Hewitt*, 12 *C. E. Gr.* 479. After a bill to foreclose a mortgage is filed, subsequent incumbrances may be made parties by filing a petition instead of a supplement bill. *Loveridge* v. *Marsh*, 3 *Stew.* 59. One who, pending a foreclosure suit, has acquired a contested claim to part of the surplus paid into court on the sale, after satisfying complainant's mortgage, cannot be made a party to the suit by petition, after final decree, for the purpose of enforcing such claim. *Mutual Ins. Co.* v. *Schwab*, 6 *Dick.* 205.

(*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, Sax.* 28. *Morris and Essex R. R. Co.* v. *Blair*, 1 *Stock.* 635. *Fowler* v. *Roe*, 3 *Stock.* 367. *Gaskill* v. *Sine*, 2 *Beas.* 130. *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. *De Hart* 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. *De Baum*, 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. *Fister* v.

Interrogatories to complainant.

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. (*a*)

Examination of witnesses.

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 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. (*b*)

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. (*c*)

VI. Setting down the cause and the hearing.

When cause to be set down for hearing.
R. S. 912.

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

Porch, 2 *Stock.* 243. Nor where matter is pleaded by way of confession and avoidance. *Miller* v. *Wack*, *Sax.* 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. *Weld*, 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.* 223. *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. *Marquise de Portes* v. *Hurlbut*, 17 *Stew.* 517. In a hearing upon bill and answer, the facts well pleaded in the answer will be taken as true, whether they be responsive to the averments of the bill or not. *Doremus* v. *Cameron*, 4 *Dick.* 1.

(*a*) 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.

(*b*) 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.* 439. 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. *Dunars*, 4 *Har.* 66. But if he secretes himself so that he cannot 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 cannot 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. *Baily*, *Pen.* *415 (*e*). 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. *Beeckman* v. *Montgomery*, 1 *McCart.* 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 cannot 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*, *Sax.* 458. But if the opposite party do not object, the party offering it cannot. *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. *Douglass* v. *Merceles*, 9 *C. E. Gr.* 25. Testimony will not be suppressed before the hearing. *Brown* v. *Buckley*, 1 *McCart.* 294. See RULES OF CHANCERY, Secs. 44, 78-95.

(*c*) See RULES OF CHANCERY. Sec. 99.

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. (*a*) Proviso.

48. [This section amended by Sec. 137, *post.*]

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. What if defendant do not attend.

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; (*b*) but such decree shall not contain any recital of the said bill, answer, or other pleadings. Pleadings, &c., 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. (*c*) 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 whenevever 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 How decrees signed after chancellor goes out of office.

(*a*) 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 22d 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. *McEwan* 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 cannot be taken except by consent of the defendant. *Young* v. *Young*, 2 *C. E. Gr.* 161. See RULES OF CHANCERY, Secs. 10-16.

(*b*) 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 *Har.* 14. *Hess* v. *Cole*, 3 *Zab.* 116. *Erie Railway Co.* v. *Ackerson*, 4 *Vr.* 33. *Hillyer* v. *Schenck*, 2 *McCart.* 398.

(*c*) 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. *Walworth*, *Hal. Dig.* 241.

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.

Effect of decree. P. L. 1855, p. 55.

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 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*)

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Proviso.

Lands not bound until abstract filed in supreme court office.

57. [This section amended by Sec. 161, *post.*]

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. [See Sec. 123, *post.*]

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. [See Sec. 123, *post.*]

(*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*, 3 *Har.* 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 Baun*, 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 husband'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. This section does not apply to an ordinary decree of foreclosure. *Dawes* v. *Wheeler*, 16 *Vr.* 67. See *Mutual Fire Insurance Co.* v. *Newton*, 21 *Vr.* 571. A *bona fide* mortgage, given after the entry of a personal decree against the mortgagor for the payment of money only, but before the filing of a statement or abstract of the decree in the supreme court, is entitled to priority over the decree. *Jersey* v. *Demarest*, 12 *C. E. Gr.* 299. The provisions of this section apply only to such decrees as resemble a judgment in the pecuniary obligations which they impose. *Close* v. *Close*, 1 *Stew.* 472. A decree in equity, except it is founded on a right or cause of action which makes the decree a lien, does not bind lands, unless such efficacy is given to it by statute. *Mutual Life Insurance Co.* v. *Hopper*, 16 *Stew.* 387. A money decree of the court of chancery has, by express statutory provision, the same force, operation and effect as a judgment of the supreme court. *Second National Bank* v. *Blauvelt*, 17 *Stew.* 173.

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 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. [See Sec. 123, *post.*]

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

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. Ib.

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 comformably to such decree, and this, notwithstanding any disability of such party by infancy, lunacy, coverture, or otherwise. (*a*)

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 fieri 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 fieri 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 decree.

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(*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 reconvey 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. *Kloepping* ads. *Stellmacher*, 7 *Vr.* 177. A decree, except for the statute, does not change the legal title. It operates *in personam*, not *in rem*, and even under the statute the decree does not operate directly upon the title unless there is a decree for a conveyance. *Condit* v. *Bigalow*, 17 *N. J. L. J.* 107.

(*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. *DeBaum*, 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. *Vanmeter* v. *Borden*, 10 *C. E. Gr.* 414. See, also, *Den, Smallwood* v. *Bilderback*, 1 *Har.* 497. *Den* v. *Johnson*, 7 *Hal.* 275. *Den, McAndrews* v. *O'Hanlin*, 3 *Har.* 127. *Bayard* v. *Colfax*, 4 *Wash. C. C.* 43. *Cortes* 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. After a sale in a foreclosure suit, and the purchaser has got his deed, a writ of assistance will go, *ex debito justitiæ*, to put him in possession. *Beatty* v. *De Forest*, 12 *C. E. Gr.* 482.

Lien of the fieri facias.

65. That a writ of fieri 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. (*a*)

When sheriff to be amerced.

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 fieri 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 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.

Proviso.

Amercement of sheriff in certain cases.

67. That if the sheriff or other officer shall neglect or refuse to execute any writ of fieri 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 fieri 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.

70. [This section amended by Sec. 124, *post*.]

(*a*) See EXECUTIONS, Sec. 18.

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 incumbrances on the said mortgaged premises, (*a*) besides costs; (*b*) 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 fieri facias issued for that purpose; which said writ of fieri 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.

Proceedings under fieri facias.

72. That the sheriff or other officer to whom such writ of fieri 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; (*c*) *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.

Surplus money invested.

Proviso.

Supersedeas in case absent defendant enter appearance.

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.

Sale when the whole of the mortgage money not due.

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 installment 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

(*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 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. *Stelle* 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. *Wikoff* v. *Davis*, 3 *Gr. Ch.* 224. *Engle* v. *Haines*, 1 *Hal. Ch.* 186. *Hoy* v. *Bramhall*, 4 *C. E. Gr.* 563. See *Klapworth* v. *Dressler*, 2. *Beas.* 62. *Stiger* 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.* 561. *Gaskill* v. *Sine*, 2 *Beas.* 400. *Blair* v. *Ward*, 2 *Stock.* 119. *Vanorden* v. *Johnson*, 1 *McCart.* 376. *Hoy* v. *Bramhall*, 4 *C. E. Gr.* 563. *Ward* v. *Hague*, 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 foreclosure suit is not a proper proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor. *Coe* v. *N. J. Midland Ry. Co.*, 4 *Stew.* 105.

(*b*) Costs refused a mortgagee. *Large* v. *Van Doren*, 1 *McCart.* 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. *Hulsizer*, 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. *Lozear*, 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.* 485. See *Mellick* v. *Creamer*, 10 *C. E. Gr.* 429.

(*c*) 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.

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, installments, 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, (*a*) and the residue of the proceeds 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. [See Sec. 177, *post.*]

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*) (1)

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 acknowledgment 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*)

(*a*) 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 installment, the residue of the money not being due. *American, &c., 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. *De Groot* v. *McCotter*, 4 *C. E. Gr.* 531. *Spring* v. *Fisk*, 6 *C. E. 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 or forfeiture, after the time when, by its terms, the principal became due, and indorsing 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. *Mallack*, 2 *Hal.* 165. *Rosenkrantz* v. *Durling*, 5 *Dutch.* 191. *Griffith* v. *Jones*, *Pen.* *932. The mortgage was given to secure the payment of interest as well as payment of the principal; and although the principal is not due, the holder of the mortgage is entitled to foreclosure for the interest in arrear. *Van Doren* v. *Dickerson*, 6 *Stew.* 388. On foreclosure for unpaid interest, the principal not being due, only so much of the property as may be necessary to raise the amount due should be sold, if the property is divisible without material injury to the security. *McFadden* v. *Mays Landing R. R. Co.* 4 *Dick.* 176.

(*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. *Kingsworth* v. *Dressler*, 2 *Beas.* 62. Such decree can only be made where the grantor was *personally* liable for the amount. *Ib. 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 *Kirkpatrick* 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 53. *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. *Ib.* 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.* 227. 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. *Gillmore*, 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.

(1) See section 1 of the act of March 12th, 1880 (P. L. 1880, p. 255), entitled "An act concerning proceedings on bonds and mortgages given for the same indebtedness and the foreclosure and sale of mortgaged premises thereunder." See *post*, title MORTGAGES.

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 incumbrance 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 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.

Fees for searches allowed.

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, the expenses paid or incurred by said party in obtaining 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, *post.*] (*b*)

X. Injunctions.

Injunction after verdict or judgment in personal actions.

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. (*c*)

In mixed 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

(*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 *Dunsmore* v. *Westcott*, 10 *C. E. Gr.* 304. A decree will not be opened and the sale thereunder set aside at the instance of a petitioner who, by neglecting to have her deeds recorded, was not made a party to the suit. *Leonard* v. *New York Bay Co.*, 1 *Stew.* 192. See *Wood* v. *Stover's Adm'rs*, 1 *Stew.* 248. *Eckerson* v. *McCulloh*, 12 *Stew.* 115. The object of the statute is to give the purchaser at foreclosure sales a title free from any latent equities to which the complainant might be subject. The statute is broad enough to cut off a mortgage put on record since the foreclosure. *McCrea* v. *Newman*, 1 *Dick.* 473. The owner of a mortgage by an unrecorded assignment, is bound by proceedings in foreclosure of a prior mortgage, to which his assignor was made a party, although he was not a party to such proceedings. *Cannon* v. *Wright*, 4 *Dick.* 17.

(*b*) This section was not intended to control charges between solicitor and client, for it expressly provides for taxation only "in favor of any party" to the action. *Strong & Sons* v. *Mundy*, 7 *Dick.* 833. See Rule 219.

(*c*) 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. *Kinney* 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. *Perrine*, 2 *C. E. Gr.* 49. The provision of this section is peremptory, and prohibits the issuing of an injunction to restrain legal proceedings after verdict or judgment at the instance of the defendant, unless the money be paid into court or a bond given according to statutory requirement. *Phillips* v. *Pullen*, 18 *Stew.* 157.

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. (*a*)

Remedy if security insufficient.

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.

Chancellor may refer question.

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.

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. (*b*)

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. (*c*)

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. (*d*)

(*a*) See Rule 127.

(*b*) 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. *Holdredge* v. *Gwynne*, 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.* 267. A defendant in a suit at law, who asks a court of equity to assume jurisdiction of the litigation, on the ground that the remedy at law is inadequate, is not obliged to give security merely because he asks the change. *Ely* v. *Crane*, 10 *Stew.* 157.

(*c*) 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 141. *Sinnickson* v. *Johnson*, 2 *Gr. Ch.* 374. If an equity judge has allowed an interlocutory injunction, which afterwards clearly appears to him to have been improperly allowed, he may, of his own motion, set it aside at any time without any notice having been given of an application to dissolve. The statute, requiring eight days' previous notice of a motion to dissolve, has reference to motions made by a party. *Conover* v. *Ruckman*, 6 *Stew.* 303.

(*d*) 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. *Emmons* 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. *Capner* 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. *Phœnix* 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 *Vanwinkle* v. *Curtis*,

XI. Proceedings with respect to unsatisfied judgments at law.

Bill for discovery. R. S. 921.

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

Power to compel discovery.

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. (*c*)

Debtor may be examined. P. L. 1864, p. 704.

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.

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. *Kaufman*, 2 *Beas.* 397. 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. *Fraas* v. *Barlement*, 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. *Magennis* v. *Parkhurst*, 3 *Gr. Ch.* 433. See *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. *Matthis*, 1 *Stock.* 110.

(*a*) A plaintiff or creditor in attachment may file a creditor's bill. *Hunt* v. *Field*, 1 *Stock.* 36. *Williams* v. *Michenor*, 3 *Stock.* 520. *Robert* v. *Hodges*, 1 *C. E. Gr.* 300. *Curry* v. *Glass*, 10 *C. E. Gr.* 108. *Melville* v. *Brown*, 1 *Har.* 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. *Holdredge* v. *Gwynne*, 3 *C. E. Gr.* 26. *Deveney* v. *Mahoney*, 8 *C. E. Gr.* 247. Can a creditor 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. *Doughty* v. *King*, 2 *Stock.* 396. *Dunman* v. *Cox*, 2 *Stock.* 437. *Swayze* v. *Swayze*, 1 *Stock.* 273. *Green* v. *Tantum*, 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. *Clevenger*, 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.* 458. 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. *Newman* v. *Van Duyn*, 15 *Stew.* 485. *Stillwell* v. *Stillwell*, 2 *Dick.* 275. All the creditors who unite in the bill or are subsequently admitted, are entitled to be heard and have their liens protected. *Voorhees* v. *Reford*, 1 *McCart.* 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. *Allen* v. *Demarest*, 14 *Stew.* 162. The return of the sheriff that the defendants are not, either in their partnership name nor 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.

(*b*) 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. A legacy in the hands of an executor upon no trust except to pay it over to the legatee, is not a trust within the meaning of the exception of a trust created by some person other than the debtor himself, and is exempt. *Bacon* v. *Bonham*, 12 *C. E. Gr.* 209. *Hardenburgh* v. *Blair*, 3 *Stew.* 645. *Force* v. *Brown*, 5 *Stew.* 118. See *Adler* v. *Turnbull & Co.*, 28 *Vr.* 62.

(*c*) A judgment which is not founded on an actual debt or other legal liability, due and enforceable at the time of its entry, will not be upheld against the creditors of the judgment debtor. *Palmer* v. *Martindell*, 16 *Stew.* 90. *Sayre* v. *Hughes*, 5 *Stew.* 652.

Order to prevent transfer of the debtor's property. Ib.

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.

Witnesses. Ib.

92. That witnesses may be required to appear and testify concerning said matters, by either party, by subpœna 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.

When receiver, pendente lite, appointed. 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. (*a*)

Depositions may be used at final hearing.

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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 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 deposition 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. (*b*)

(*a*) Where a receiver may be appointed. *Fuller* v. *Taylor*, 2 *Hal. Ch.* 301. *Whitney* v. *Robbins*, 2 *C. E. Gr.* 360. The receiver, by virtue of his appointment, has no interest in real estate held in trust for the judgment debtor. *Boid* v. *Dean*, 3 *Dick.* 193.

(*b*) A *subpœna* may be amended if by mistake it has been antedated. *Dinsmore* 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. *Codington* v. *Mott*, 1 *McCart.* 430. As to *parties*, *Henry* v. *Brown*, 4 *Hal. Ch.* 245. *Plumley* v. *Plumley*, 4 *Hal. Ch.* 511. *Codington* 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. C.* 202. *Conrad* v. *Mullison*, 9 *C. E. Gr.* 68. See *Robinson* v. *Davis*, 3 *Stock.* 302. But if the objection be delayed until the final hearing it cannot 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.* 507. *Cutler* v. *Tuttle*, 4 *C. E. Gr.* 549. *Berryman* 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, cannot avail. *Wilson* v. *King*, 8 *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. *Barret* v. *Doughty*, 10 *C. E. Gr.* 379. Another defendant cannot 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*, 8 *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.* 445. *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

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. Notice to be taken of the filing of pleadings.

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.

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 defense set up raises a new issue. *Van Riper* v. *Claxton*, 1 *Stock.* 302. Complainant cannot 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 cannot dismiss his own bill as to part of the relief prayed for, and proceed with the residue; he must amend. *Camden and Amboy 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. *Lore* 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. *Codington* 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 71 and cases cited. See *State Bank* v. *Reeder*, *Hal. Dig.* 231. A new subpœna is not necessary where the defendant has not appeared. *Equitable Life Ins. Co.* v. *Laird*, 9 *C. E. Gr.* 319. Complainant cannot recover the costs of an amendment, although he obtain a decree to recover the costs of suit. *Hal. Dig.* 240, ¶¶ 1, 5. *Query*—Whether an amendment of a bill at the final hearing can be allowed, when such amendment consists of facts that falsify materially the facts originally stated. *Thornton* v. *Ogden*, 5 *Stew.* 723. Bill may be amended almost at any time, when the amendment is necessary in order that the real matter in controversy may be fairly and justly tried. *Feary* v. *Hayes*, 17 *Stew.* 425. Bill cannot be amended after final hearing so as to make a new case, or to state a new and additional claim to relief. *Jones* v. *Davenport*, 18 *Stew.* 77. RULES OF CHANCERY, Sec. 66.

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. *Hummer*, 2 *C. E. Gr.* 269. Or to bring matters of defense before the court when defendant has been misled by counsel. *Burgin* v. *Giberson*, 8 *C. E. Gr.* 403. The amendment cannot 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 defense as usury. *Ib.* 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. *Ib.* And by filing a supplemental answer without altering the original. *Huffman* v. *Hummer*, 2 *C. E. Gr.* 269. Answers should be amended cautiously, and leave should never be granted except when necessary to the doing of justice. *Mechanics' Bank* v. *Burnet Mfg. Co.*, 5 *Stew.* 236. An answer may be amended even after the announcement of the decision of the cause. *Arnett* v. *Welch*, 1 *Dick.* 543. Answer may be amended to set out an instrument material to the defense. *Arnaud* v. *Griggs*, 1 *N. J. L. J.* 14.

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. *Miller* 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 enrollment, 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. *Dorsheimer* 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.* 532. 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. *Citizens' 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. *Hild*, 3 *Stock.* 25. If defendant in a foreclosure is not personally liable, an amendment rendering him so will not be allowed. *Embury* v. *Bergamini*, 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. An enrolled decree may be altered through a bill of review, where there is a plain mistake of law apparent on the record in view of the uncontested evidence. *Jones* v. *Fayerweather*, 1 *Dick.* 237. RULES OF CHANCERY, Secs. 66–71.

(*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. *Hagerty* v. *Lee*, 18 *Stew.* 255. The court decides facts and law, unless there is contradictory evidence. *Miller* v. *Wack*, *Sax.* 205. *Hildreth* v. *Schullinger*, 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. *Heishon*, 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. *Fister* 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. *Casperson*, 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*, *Sax.* 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 *Har.* 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 cannot 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.

Compensation of officers called in, &c., by chancellor.
P. L. 1870, p. 43.

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.

Moneys brought into court to be deposited in bank.

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. (*a*)

Punishment for contempt.

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 contempt, 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. (*b*)

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 fieri facias or capias ad satisfaciendum, issuing out of the said court, or by subpœna and attachment. (*c*)

The party applying for a new trial cannot 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 a new trial prepares the case and submits it to the solicitor of the adverse party, and if they cannot 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's Bank* v. *Fairchilds*, 3 *Vr.* 542.

(*a*) Interest on money ordered to be paid into court and paid in with such money, by the purchaser, not allowed him, he having been in possession of the premises ever since the making of the order. *Phillips* v. *Helmbold*, 11 *C. E. Gr.* 202. Where the sum deposited was $8,000 and the amount of complainant's damages, $5,000—*Held*, that upon the payment of $5,000 with interest and costs, the balance could not be retained for the faithful performance of the other requirements of the decree. *Carpenter* v. *Easton and Amboy R. R. Co.*, 1 *Stew.* 390. See *Potter* v. *Gibbons*, 2 *N. J. L. J.* 47. See RULES OF CHANCERY, Secs. 33, 34, 161, 216.

(*b*) An attachment for contempt was discharged where the complainant had failed to exhibit interrogatories within the time limited by the rule. *Jewett* v. *Dringer*, 12 *C. E. Gr.* 271. When a party has disobeyed an injunction of this court to the injury of another party, resulting in damages unliquidated in their nature and not ascertainable by the machinery of this court, it will not, in the absence of special circumstances, commit the offender until he compensate the injured party, but leaves the latter to his remedy at law. *Thompson* v. *Penna. R. R. Co.*, 3 *Dick.* 105. See *Dodd* v. *Una*, 13 *Stew.* 672. An order to show cause why a party be not committed for contempt is to be filed, with the affidavits on which it is founded, as soon as possible, with the clerk of the court, and must, before further proceedings are had, be actually signed by the chancellor. *Dowden* v. *Junker*, 3 *Dick.* 554. The payment of a counsel fee cannot be imposed upon a party held in contempt by the court of chancery, as a punishment. *O'Rourke* v. *Cleveland*, 4 *Dick.* 577. A party in contempt cannot be adjudged to pay costs and counsel fee, and then to await further punishment to be imposed at a future period, if the court shall think proper. *O'Rourke* v. *Cleveland*, 4 *Dick.* 577.

(*c*) A successful party is entitled to costs. *Hal. Dig.* 240, § 3. *Cammann* v. *Traphagen*, *Sax.* 230. *Buckley* v. *Corse*, *Sax.* 505. *Loss* v. *Obry*, 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 cannot 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. *Righter*, 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. *Coddington* v. *Idell*, 3 *Stew.* 540. 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, Sec. 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.* 267. *Attorney-General* v. *Moore*, 4 *C. E. Gr.* 504. *Jacobus*

Certain proceedings abolished.

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

Office of register abolished.

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

Certain rules, &c., not to be registered.

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.

Chancellor to make rules. P. L. 1852, p. 256.

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. (*a*.)

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.* 325. But not where the necessity for filing the bill was caused by the misconduct of the party. *Post* v. *Stevens*, 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.* 389. 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. *Townley*, 6 *C. E. Gr.* 355. 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. *Updyke* v. *Bartles*, 2 *Beas.* 231. 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 *Har.* 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. *Delany* v. *Noble*, 2 *Gr. Ch.* 446. *Carpenter* v. *Easton and Amboy R. R. Co.*, 1 *Stew.* 390. 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. When irrelevant evidence is taken and the examination unnecessarily protracted, neither costs nor counsel fees should be allowed for taking such testimony. *Wintermute* v. *Wilson*, 1 *Stew.* 437. Where the volume of evidence, taken before a master is swelled by testimony taken by the prevailing party, which is unimportant or irrelevant and taken with needless prolixity, court will disallow costs and expenses of printing same. *Yard* v. *Ocean Beach Association*, 4 *Dick.* 306. *Buckman* v. *Buckman*, 6 *Stew.* 354. When a suit is necessary in the proper administration of a fund given by will, its costs and a reasonable counsel fee may be allowed out of the fund. *Noe's Administrator* v. *Miller's Executors*, 4 *Stew.* 234. A solicitor who is a party to a suit and appears in his own behalf, is entitled to the allowance made by the fee bill, except a retaining fee. *Flaacke* v. *Jersey City*, 6 *Stew.* 57. When defendants, in good faith, sever in their answers, each one may be allowed his costs, although they employed the same solicitor. *Putnam* v. *Clark*, 7 *Stew.* 51. *Garwood* v. *Hartley*, 12 *Stew.* 78. If a bill is demurrable and allowed by the defendant to proceed to a hearing, and then dismissed for want of equity, the dismissal will be without costs. *Dawes* v. *Taylor*, 8 *Stew.* 40. *Walker* v. *Walker*, 9 *Stew.* 377. Court of appeals will refuse costs to a complainant below when it appears that the costs have been increased by superfluous recitals and statements in the bill. *Vliet* v. *Wyckoff*, 15 *Stew.* 642. A map annexed to a bill or answer, the accuracy of which is verified by affidavit, and used on an application for injunction, cannot be taxed as an affidavit. *Booraem* v. *North Hudson County R. R Co.*, 17 *Stew.* 70. The allowance of costs and counsel fees is in the discretion of the chancellor, to be exercised on equitable principles, which, in their nature, forbid an arbitrary rule by percentage. *United, &c., Ins. Co.* v. *Smith*, 6 *Dick.* 635.

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. *Vanmetee* v. *Borden*, 10 *C. E. Gr.* 414.

Attachment for contempt. *Magennis* 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. *Terhune* v. *Midland R. R. Co.*, 11 *Stew.* 423.

Dower, where title is disputed. *Palmer* v. *Casperson*, 2 *C. E. Gr.* 207.

Exceptions to master's report. *Sandford* v. *Clark*, 11 *Stew.* 655.

Execution, motion to set aside. *McPherson* v. *Housel*, 2 *Beas.* 209.

Executors not to pay. *Gifford* v. *Thorn*, 1 *Stock.* 702. *Shepherd* v. *McClaim*, 3 *C. E. Gr.* 128. *Norcross* v. *Boulton*, 1 *Har.* 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. *Titus* v. *Titus*, 3 *Stew.* 95. See ORPHANS' COURT, Sec. 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. *McEwan* v. *McEwan*, 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. *Whitenack* 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. *Feit* 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. 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.

Feigned issue. Although said to be discretionary, the rule is they follow the suit. *Carpenter* v. *Easton and Amboy R. R. Co.*, 1 *Stew.* 390.

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*, Sec. 71, note (*b*). 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. *Pidcock*, 6 *C. E. Gr.* 312.

Payment of money into court. *State Bank* v. *Holcomb*, 2 *Hal.* 193. See *Earle* v. *Earle*, 1 *Har.* 273. *McTighe* v. *Dean*, 7 *C. E. Gr.* 81. See TENDER, *infra*.

Printing the case, disallowed. *Decamp* v. *Crane*, 6 *C. E. Gr.* 544. *Prochein ami. Voorhees* v. *Polhemus*, 9 *Stew.* 456.

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. *Hulsizer*, 5 *C. E. Gr.* 309. When denied. *Lozear* v. *Shields*, 8 *C. E. Gr.* 509. *Melick* v. *Creamer*, 10 *C. E. Gr.* 429. *Winters* v. *Earl*, 7 *Dick.* 52. See *ante*, Sec. 71, note (*b*).

Tender after. *Hill* v. *White*, *Sax.* 435. *Woodruff* v. *Depue*, 1 *McCart.* 169. *Thorn* 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. *Third National Bank* v. *Cary*, 12 *Stew.* 25.

Costs may be retaxed 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 costs. *Norcross* v. *Boulton*, 1 *Har.* 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, Secs. 104–113.

(*a*) *Kirkpatrick* v. *Corning*, 13 *Stew.* 241.

Executions may issue without revival of decree.
P. L. 1855, p. 288.

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.

Injunction masters, during absence of chancellor.
P. L. 1867, p. 166.

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. (*a*)

Chancellor may appoint trustee for receiving and managing trust property in certain cases.
P. L. 1873, p. 14.

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. (*b*)

Chancellor may allow counsel fee instead of retaining fee in taxed bill of costs.
P. L. 1873, p. 116.

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.] (*c*)

XIII. Appeal.

Appeal, in what cases and when brought.
P. L. 1873, p. 123.

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; (*d*) and all appeals, except from final decrees, shall

(*a*) See RULES OF CHANCERY, Sec. 121.
(*b*) See RULES OF CHANCERY, Sec. 162.
(*c*) This section does not control the charges which attorneys, solicitors and counsel may make against their clients, for it merely enables the chancellor to allow for counsel such fee as he may deem just, "instead of the retaining fee now allowed to counsel by statute." *Strong & Sons* v. *Mundy*, 7 *Dick.* 833. See RULES OF CHANCERY, 133-137.
(*d*) 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. *Black* 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*, 8 *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. *Lamb*, 1 *Beas.* 108, 2 *Beas.* 456. *Tradesmen's 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. R. 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. E. 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 a 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, cannot 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*

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. (*a*)

XIV. Vice chancellor, his duties and powers.

Vice chancellor, how appointed.

115. That there shall be a vice chancellor, who shall be a counselor-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. (*b*)

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. (*c*)

May employ reporter.

Fix compensation and apportion same.

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.

Chancellor may divide the state into districts.

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.

Shall not practice law.

Salary.

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,

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. *Westcot* v. *Bradford*, 4 *Wash. C. C.* 493.

An order refusing to set aside a sale on foreclosure of a mortgage is appealable. *Woodward* v. *Bullock*, 12 *C. E. Gr.* 507. An appeal from a final decree brings up all interlocutory orders and decrees involving the merits, as well as the master's report, together with the evidence upon which they are founded. *Decker* v. *Ruckman*, 1 *Stew.* 614. Orders and decrees relative to pleadings and adjudications merely incidental to the suit and not affecting the merits, are conclusive, except when appealed from within forty days. *Ib.* It is the notice of appeal filed in the court of chancery that is the appellate act giving the court of appeals cognizance of the case. *Barton* v. *Long*, 18 *Stew.* 160. If a decree of the court of errors be misentered in the minutes, it must be executed by the court of chancery according to its terms, the proper practice being to apply to the court of errors to rectify the entry of the decree. *Tuttle* v. *Gilmore*, 15 *Stew.* 369. An order denying an application for a rehearing is not an appealable order. *Read* v. *Patterson*, 17 *Stew.* 211. An order denying an application to open a decree, and for leave to answer and present the merits of the defense, is an appealable order. *Ib. Day* v. *Allaire*, 4 *Stew.* 303.

(*a*.) See RULES OF CHANCERY, Secs. 149-152. As to rehearin see Rules 143-148.

(*b*) See RULES OF CHANCERY, Secs. 160, 193-196.

(*c*) See RULES OF CHANCERY, Secs. 197-199.

and also ten dollars for every day actually engaged in the performance of such duties, to be ascertained and certified by the chancellor, and to be paid by the treasurer of the state with said salary quarterly. [See Sec. 170, *post.*]

XV. Supplements.

Supplement.

P. L. 1875, p. 100.

Approved April 9, 1875.

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

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.*"

Chancellor may allow percentage on amount of decree as counsel fee.

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 or more than five per centum of the amount of such decree." (*a*)

Supplement.

P. L. 1876, p. 58.

Approved March 16, 1876.

Lis pendens when filed in register's office.

123. SEC. 1. That sections fifty-seven, fifty-eight, fifty-nine, sixty, sixty-one and sixty-two of the act to which this is a supplement, and which now read as follows [see Rev. pp. 114, 115], be and the same are hereby amended so that, in any county in which the office of register of deeds and mortgages now exists, or shall hereafter exist, the provisions of said sections relating to the clerk of the court of common pleas and county clerk, shall hereafter apply to such register and not to such clerk, and the provisions relating to the office of such clerk shall hereafter apply to the office of such register and not to the office of such clerk.

Supplement.

P. L. 1876, p. 84.

Approved April 6, 1876.

124. SEC. 1. That the seventieth section of the act to which this act is a supplement, which is in the words following, to wit [see Rev. p. 116], be and the same is hereby amended so that the same shall read and be in the words following, to wit:

Issuing execution, in case of death, disability, &c., of sheriff or master.

[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 any party who has entered an appearance in the suit or in whose behalf the decree was made, 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 orginally directed to him; and such sheriff or master shall be entitled to the same fees for

(*a*) See *O'Rourke* v. *Cleveland*, 4 *Dick.* 577.

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.]

Supplement.

Approved April 13, 1876. P. L. 1876, p. 140.

Surplus money arising from sale of mortgaged premises, when paid to executor, &c.

125. SEC. 1. That the surplus money arising from the sale of mortgaged premises, in cases where the mortgagor, or person owning the mortgaged premises, shall be deceased at the time of sale, may, if in the opinion of the chancellor the same shall be expedient or necessary for the proper administration of the estate, be paid to the administrator or administrators, executor or executors, of said deceased, to be administered in the same manner as money arising from the sale of real estate made by administrators or executors; *provided*, said administrator or administrators, executor or executors, shall enter into bond as now required by law, upon their application for the sale of real estate.

Supplement.

Approved March 1, 1877. P. L. 1877, p. 37.

126. SEC. 1. [Amended by Secs. 149 and 150, *post.*]
127. SEC. 2. [Amended by Sec. 151, *post.*]

Supplement.

Approved April 4, 1878. P. L. 1878, p. 290.

Chancellor may refer the hearing of any cause to a master.

128. SEC. 1. That the chancellor may refer to any master in chancery, who shall be a counselor-at-law of at least five years' standing, 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.

Master may take and hear evidence of witnesses orally and settle and sign report thereof for appeal.

129. SEC. 2. That when any cause or matter shall be so referred to a master, 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 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 or matter, for use on appeal from the decree of the chancellor therein or otherwise, then such master shall settle and sign such report. (*a*)

May employ stenographic reporter.

130. SEC. 3. That it shall be lawful for such master, when any cause or matter is so referred to him, 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 parties in such 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.

Chancellor may provide by rule to what masters references shall be made.

131. SEC. 4. That it shall be lawful for the chancellor, by rule of court, to fix and determine to what masters the references provided for by this act shall be made, and to remove and change the same at his pleasure, and to fix the compensation to be paid to such masters for their services, which compensation shall be proportionate, as near as may be, to the actual value of such services, and shall be paid them from the state treasury on the certificate of the chancellor, and the chancellor may make all such general rules for the effectual execution of this act as he shall deem necessary and proper.

(*a*) See RULES OF CHANCERY, Secs. 201-204.

Chancellor may make general rules to regulate the taking of evidence.

132. SEC. 5. That the chancellor may make such general rules as he shall deem necessary and proper to provide for, expedite and regulate the taking and production of evidence in the court of chancery in any cause or matter pending therein.

Supplement.

P. L. 1879, p. 177.

Approved March 13, 1879.

Reduction of fees in certain foreclosure cases.

133. SEC. 1. That in all foreclosures of mortgages and the sale of mortgaged premises, where the amount due does not exceed three hundred dollars, the fees of the solicitor, clerk, chancellor, master and examiner, sheriff, or any other official, are hereby reduced one-half of the amount now fixed by law. (*a*)

Repealer.

134. SEC. 2. That all acts or parts of acts inconsistent herewith be and the same are hereby repealed.

Supplement.

P. L. 1879, p. 267.

Approved March 14, 1879.

135. SEC. 1. [This section, amending Sec. 17, *ante*, is amended by Secs. 155 and 167, *post*.]

Supplement.

P. L. 1880, p. 24.

Approved February 10, 1880.

136. SEC. 1. That section thirteen of said act, and which reads as follows [see Rev. p. 105], be amended so as to read as follows:

Subpœnas, &c., how served and by whom.

[That every subpœna or process for appearance shall be served by the same officers now authorized to serve writs of summons and other common-law processes, on the person to whom it is directed, or a copy thereof left at his dwelling-house, or usual place of abode, by one of said officers, at least ten days prior to its return.]

Supplement.

P. L. 1880, p. 95.

Approved March 3, 1880.

137. SEC. 1. That the forty-eighth section of the act to which this is a supplement, which section reads as follows [see Rev. p. 112], be amended to read as follows:

If complainant do not attend at the hearing, decree may be made in favor of defendant or bill dismissed with costs.

[That if the complainant 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 defendant or defendants, and the court thereupon may decree in favor of the defendant or defendants, or complainant or complainants, as the case may require, or may dismiss complainant's said bill with costs.]

Supplement.

P. L. 1881, p. 119.

Approved March 15, 1881.

Chancellor authorized to appoint an additional vice chancellor.

138. SEC. 1. That in addition to the vice-chancellor provided for in the act to which this is a supplement, there shall hereafter be another vice chancellor, who shall be a counselor-at-law of at least ten years' standing, and 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.

Powers, duties and compensation of vice chancellor.

139. SEC. 2. That the powers, duties and compensation of the vice chancellor, appointed by virtue of this act, shall be similar to those of the vice chancellor appointed by virtue of the act to which this is a supplement.

(*a*) In taxing the sheriff's fees, the taxed costs of the cause, excluding the sheriff's execution fees, must be included in computing the amount on which the sheriff's fees are calculated. *Crane* v. *Feltz*, 9 *Stew.* 159.

Supplement.

Approved March 24, 1881. P. L. 1881, p. 220.

140. SEC. 1. [Amended by Sec. 165, *post.*]

141. SEC. 2. That all such defendants and all persons falling within the description of "heirs, devisees or personal representatives" of the defendant supposed to be dead, as aforesaid, shall thereupon be bound by all orders and decrees in said cause, as if they had been duly named and described and served with process within this state. Defendants, heirs, devisees, &c., bound by all orders, decrees in cause.

142. SEC. 3. That proofs may be made, costs allowed, security ordered, and proceedings for restitution or other relief from said decrees and orders had, in like manner as the same are now allowed by law in the case of absent defendants. Proceedings for relief from said decrees.

Supplement.

Approved March 8, 1882. P. L. 1882, p. 65.

143. SEC. 1. [This section is repealed by Sec. 158, *post.*]

144. SEC. 2. That the vice chancellors shall have power to appoint suitable persons, to hold office during his pleasure, as sergeants-at-arms, whose duty it shall be to attend the court or hearings held by the vice chancellors at the city of Camden and city of Jersey City, when required, whose compensation shall be three dollars per day each for each day they shall be in actual attendance upon said courts, to be paid by the treasurer of the state upon the certificate of the vice chancellors. [See Sec. 151, *post.*] Sergeants-at-arms, by whom appointed and their compensation.

Supplement.

Approved March 10, 1882. P. L. 1882, p. 89.

145. SEC. 1. That when any decree made in the court of chancery in any suit of the pendency of which notice shall have been or shall be filed in the office of the clerk of the court of common pleas or of the register of deeds of any county, shall have been or shall be paid, satisfied or performed, or when pending such suit the matters in difference between the parties thereto shall have been or shall be settled by the said parties, the lands and real estate affected by said suit and mentioned in such notice shall be discharged of all equities set up in the bill of complaint in said suit, by the entry on the margin of the record of the notice of the pendency of such suit of satisfaction and discharge, which satisfaction and discharge shall be entered by the party receiving satisfaction or his solicitor, or by the clerk or register of deeds of the proper county upon receiving and filing a warrant or authority for the purpose, executed by the said party or his solicitor in the manner provided by law in respect to the satisfaction of judgments, and the same fees shall be paid for services rendered under this act as are allowed in the supreme court upon satisfaction of a judgment therein. The lien of a lis pendens to be discharged when decree is paid or suit settled. Satisfaction and discharge to be entered.

Supplement.

Approved March 22, 1882. P. L. 1882, p. 160.

146. SEC. 1. That from and after the passage of this act, the stenographer employed to report the proceedings in the vice chancellors' courts shall be paid for his services the same, and no more, as the respective stenographers employed in the circuit courts of this state, and that the sum due to such stenographer shall be paid quarterly, on the certificate of the vice chancellor, by the state treasurer, out of the fees received by him from the court of chancery. Services of stenographer to be paid by state treasurer.

Supplement.

Approved February 17, 1885. P. L. 1885, p. 31.

147. SEC. 1. That it shall be lawful in any action now pending or hereafter to be brought in the court of chancery for the partition and sale of lands, for the clerk of said court to tax as a part of the taxable costs in favor of the complainant in said action any and all such legal fees and Fees for searches may be included in actions for partition and sale of land.

charges as may have been necessarily paid or incurred for or in behalf of said party in procuring searches against or in relation to the title of the lands sought to be partitioned or sold in said action, which fees or charges shall be ascertained in such way as the chancellor may direct.

Counsel fee to complainant may be included.

148. SEC. 2. That in any such suit it shall be lawful for the chancellor, in his discretion, to allow a counsel fee to the complainant, to be taxed in the bill of costs, whether an appearance shall have been entered or an answer or answers shall have been filed by any of the defendants or not.

A supplement to the act entitled "A supplement to the act entitled 'An act respecting the court of chancery'" [Revision], approved March twenty-seventh, one thousand eight hundred and seventy-five, which supplement was approved March first, one thousand eight hundred and seventy-seven.

Approved April 20, 1885.

P. L. 1885, p. 263.

149. SEC. 1. [This section, amending Sec. 126, *ante*, is amended by Sec. 150, *post*.]

A further supplement to an act entitled "A supplement to the act entitled 'An act respecting the court of chancery'" [Revision], approved March twenty-seventh, one thousand eight hundred and seventy-five, which supplement was approved March first, one thousand eight hundred and seventy-seven.

Approved February 2, 1886.

P. L. 1886, p. 13.

150. SEC. 1. [This section, amending Secs. 126 and 149, *ante*, is repealed by Sec. 159, *post*.]

151. SEC. 2. That the second section [see Sec. 127, *ante*] of the said act shall be amended so as to read as follows:

Appointment and compensation of sergeant-at-arms.

[That the chancellor and vice chancellors shall have power to appoint suitable persons, to hold office during their pleasure, as sergeant-at-arms of their respective court-rooms, whose duty it shall be to attend the courts or hearings when required, for which service they shall each receive three dollars per day for each day they shall respectively be in actual attendance upon the court, to be paid by the treasurer of the state upon the certificate of the chancellor or vice chancellor.]

Supplement.

Approved April 5, 1886.

P. L. 1886, p. 176.

Chancellor may order sale pending foreclosure suit where mortgaged property is liable to deteriorate in value.

152. SEC. 1. That the court of chancery shall have power in any suit for the foreclosure or satisfaction of any mortgage covering real or personal property, or both, upon the petition of any party to such suit, where the property mortgaged is of such character or so situated as to make it liable to deteriorate in value pending said suit, or to make its care or preservation difficult or expensive, to order a sale to be made thereof at public or private sale, through a receiver, sheriff, master, or otherwise, as the said court may direct, and the proceeds of any such sale to be brought into court, there to remain subject to the same liens and equities of all parties in interest as was the mortgaged property, and to be disposed of as the said court by its decree or order shall direct.

400-152
16D-554

Proceeds of sale paid into court.

Supplement.

Approved March 30, 1887.

P. L. 1887, p. 73.

Payment of stenographer in causes before advisory masters.

153. SEC. 1. That from and after the passage of this act, the stenographer employed to report the proceedings in causes before any advisory master shall be paid for his services the same and no more, as the respective stenographers employed in the circuit courts of this state, and that the sum due to such stenographer shall be paid on the certificate of the advisory master approved by the chancellor, by the state treasurer, out of the fees received by him from the court of chancery.

Supplement.

Approved April 21, 1887. P. L. 1887, p. 179.

154. SEC. 1. That if upon the foreclosure of any mortgage heretofore or hereafter given and the sale of the premises therein described, there shall be paid into court any moneys representing an estate in dower or by the curtesy in said premises or any part thereof, any person entitled to such dower or estate may make application to the court for the sum in gross in lieu of the estate aforesaid, and the court shall direct the payment of such sum in gross out of the proceeds of the sale of the premises to the person entitled to such estate, as shall be deemed a just and reasonable satisfaction for such estate or interest, and which the person so entitled shall consent in writing to accept in lieu thereof; but in case no such consent be given before the distribution of the proceeds thereof, then the court shall ascertain and determine what proportion of such proceeds will be a just and reasonable sum to be invested for the benefit of the person entitled to such estate in dower or by the curtesy, and shall order the same to be put at interest on sufficient security of real property or invested in public stock or deposited in some safe and reliable savings institution by order and under the direction and control of said court for the benefit of the parties entitled, and the interest thereon to be paid to them as the same may become due as a compensation for and in lieu of the said estate in dower or by the curtesy, and at the decease of the person entitled to the same the principal sum shall be paid to or distributed among the parties entitled thereto.

Gross sum in lieu of dower or curtesy may by consent be ordered paid out of surplus on foreclosure.

In case no consent, court may determine same and order invested.

Supplement.

Approved April 21, 1887. P. L. 1887, p. 199.

155. SEC. 1. [This section, amending Secs. 17 and 135, *ante*, is amended by Sec. 167, *post*.]

156. SEC. 2. That all acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed.

Repealer.

Supplement.

Approved February 29, 1888. P. L. 1888, p. 111.

157. SEC. 1. That the clerk in chancery, with the approval of the chancellor, shall provide at the expense of the state duly-furnished rooms in the cities of Camden, Jersey City and Newark for the use of the chancellor, vice chancellors and advisory masters in the hearing of causes and motions, and that the rent and expenses thereof shall be ascertained and certified by the chancellor and paid by the treasurer of the state, and shall not exceed in all four thousand five hundred dollars per annum.

Clerk in chancery to provide rooms for chancellor, vice chancellor and advisory masters.

Rent and expenses, how paid, &c.

158. SEC. 2. That section one of an act entitled "A further supplement to an act entitled 'An act respecting the court of chancery,'" approved March twenty-seventh, one thousand eight hundred and seventy-four, which supplement was approved March eighth, one thousand eight hundred and eighty-two [see Sec. 143, *ante*], be and the same is hereby repealed.

Section repealed.

159. SEC. 3. That section one of an act entitled "A further supplement to an act entitled 'A supplement to the act entitled "An act respecting the court of chancery" [Revision], approved March twenty-seventh, one thousand eight hundred and seventy-five,' which supplement was approved March first, one thousand eight hundred and seventy-seven, which further supplement was approved February second, eighteen hundred and eighty-six" [see Sec. 150, *ante*], be and the same is hereby repealed.

Section repealed.

Supplement.

Approved April 3, 1888. P. L. 1888, p. 381.

160. SEC. 1. That all persons aggrieved by any final decree of the court of chancery made upon bill filed to quiet the title to lands, may appeal from the same or any part thereof to the court of errors and appeals, and

Appeal from decree on bill to quiet title to be made in three months.

all appeals from such final decrees shall be made within three months after making such decree; *provided*, that in cases where the person entitled to such appeal from any final decree be an infant, feme covert or insane, he or she shall have three months to bring such appeal after such disability shall be removed.

Proviso.

Supplement.

P. L. 1888, p. 427.

Approved April 16, 1888.

161. SEC. 1. That section fifty-seven of an act entitled "An act respecting the court of chancery" [Revision], approved March twenty-seventh, one thousand eight hundred and seventy-five, be and the same is hereby amended so as to read as follows:

Lis pendens.

[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 or recorded mortgage; *and provided further*, that in case the complainant named in such bill do not take steps to prosecute the suit diligently within three years after the filing of such written notice of the pendency of such suit, then the chancellor may, upon application to him by any interested party, and upon notice to the complainant or his solicitor, declare the filing of such notice to be null and void and of no effect.]

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

Proviso.

Proviso.

Supplement.

P. L. 1889, p. 88.

Approved March 25, 1889.

Two additional vice chancellors may be appointed.

162. SEC. 1. That in addition to the vice chancellors provided for in the act to which this is a supplement, there shall hereafter be another vice chancellor or other vice chancellors, not exceeding two, as and when the chancellor shall determine, each of whom shall be a counselor-at-law of at least ten years' standing, and each of whom shall be appointed by the chancellor and commissioned by the governor, under the great seal of the state, and each of whom shall continue in office for seven years from the date of his commission.

Term of office.

Powers, duties and compensation.

163. SEC. 2. That the powers, duties and compensation of the vice chancellors, and each of them, who shall be appointed by virtue of this act, shall be similar to those of the vice chancellors heretofore appointed by virtue of the act to which this is a supplement.

Supplement.

P. L. 1890, p. 138.

Approved March 31, 1890.

164. SEC. 1. That the provisions of the fourth section of the act entitled "An act concerning proceedings on bonds and mortgages given for the same indebtedness and the foreclosure and sale of mortgaged premises thereunder," approved March twelfth, one thousand eight hundred and eighty, which section is in these words:

Act requiring report of sale and proof of sale at highest and best price to apply to all sales of land under any decree or order.

"That in all foreclosure proceedings hereafter commenced, the sheriff or other officer who may be directed to sell any mortgaged premises shall, after making such sale, report the same within five days thereafter to the court out of which an execution or order to sell is issued, stating the name of the purchaser or purchasers and the price obtained, and if the said court, or a judge thereof, shall approve of such sale, they shall confirm the same as valid, effectual in law, and shall, by rule of court allowed in open court, or by a judge thereof at chambers, direct the said sheriff or other

officer to execute good and sufficient conveyance in law to the purchaser or purchasers for the mortgaged premises so sold; *provided*, that no sale of mortgaged premises shall be confirmed by the court or further proceedings had until the court or such judge is satisfied, by evidence, that the property has been sold at the highest and best price the same would then bring in cash, and such evidence may be in form of affidavits," shall apply to and govern all sales of land or any interest therein made under and by virtue of any decree or order of the court of chancery, subject, however, to such rules and orders in respect thereto as the said court may at any time make. (*a*)

Amendatory act.

Approved March 9, 1891. P. L. 1891, p. 96.

165. SEC. 1. That section one [Sec. 140, *ante*] of an act entitled "A supplement to an act entitled 'An act respecting the court of chancery,' approved March twenty-seventh, in the year one thousand eight hundred and seventy-five," which supplement was approved March twenty-fourth, in the year one thousand eight hundred and eighty-one, be amended so as to read as follows:

[That in all actions heretofore or hereafter commenced in the court of chancery of New Jersey, by bill of complaint affecting or concerning the title to any lands lying in the state of New Jersey, or to foreclose a mortgage, or to establish and enforce any other lien or charge against lands in this state, mentioned and described in said bill, whenever it shall appear by the allegations of said bill of complaint, duly verified by the affidavit of the complainant or his agent or solicitor thereto annexed, that any person mentioned in said bill of complaint as having or having had, claiming or having claimed, or believed by the complainant to claim or to have claimed, any right, title, interest or estate in or to said lands, or any part thereof, or any mortgage or other lien or charge thereon, or his heirs, devisees or personal representatives, are proper parties defendant to said bill of complaint; and that the complainant, after diligent and careful inquiry therefor, made as in case of absent defendants, has been unable to ascertain whether such person is still alive, or if he is known or believed to be dead, has been unable to ascertain the names and residence of his heirs, devisees or personal representatives, or of such of them as are proper parties defendant as aforesaid, such action may proceed against such person by name, and his heirs, devisees and personal representatives as in case of absent defendants whose names are known; *provided, nevertheless*, that such notice as is now required by law to be published against absent defendants in default of personal service, addressed to such person by name and to "his heirs, devisees and personal representatives," and containing such further statements and giving such further time as the chancellor may by his order direct, be first published and mailed in such manner as the chancellor may by his order in said action direct; and in case such person or his heirs, devisees or personal representatives shall not appear, plead, answer or demur within the time limited in said notice, or further allowed by the chancellor, if he shall think proper, on proof to the satisfaction of the chancellor of mailing and publication of said notice, as directed, such action may proceed in all respects as though such person or his heirs, devisees or personal representatives had been duly named and described and served with process of subpœna in said action and had failed to appear, plead, answer or demur to the complainant's bill of complaint within the time thereto allowed by law.]

Actions heretofore or hereafter commenced affecting or concerning title to lands, or to foreclose a mortgage, or enforce a lien, may be proceeded against persons claiming any right, title, &c., or his heirs, devisees, &c.

Proviso.

Supplement.

Approved March 28, 1892. P. L. 1892, p. 291.

166. SEC. 1. That each of the several vice chancellors of this state, when sitting as judges of the court of chancery for the transaction of the business of said court, shall have power to adjudicate upon and punish any and all

Vice chancellors have power to punish for contempt.

(*a*) See *Bethlehem Iron Co.* v. *Phila. and Sea Shore Ry. Co.*, 4 *Dick.* 356.

contempts committed by any person or persons in the presence of the court so held by such vice chancellor, in same manner as the chancellor may now do, and the several sheriffs and keepers of the common jails of the several counties of this state shall respect and execute all orders and commitments made and signed by either of the said several vice chancellors in any matters of contempt in all respects the same as if made and signed by the chancellor, provided that any person adjudicated guilty of contempt under this act shall have right of immediate appeal to the chancellor, which appeal shall operate as a stay of proceedings and the chancellor shall provide by rule for the manner and method of such appeals, and shall hear them on the merits.

Proviso.

Supplement.

P. L. 1892, p. 379.

Approved March 30, 1892.

167. SEC. 1. That the seventeenth section [see Secs. 17, 135 and 155, *ante*] of the act to which this is a supplement be amended to read as follows:

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

[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, to an amount not exceeding the penalty of said bond, and whether the said bill and process be signed by the complainant or his solicitor, then the said suit may be stayed until such bond be filed, and if it be not filed by the time appointed by the court, the bill shall be dismissed with costs; *provided*, that in lieu of such bond the complainant may deposit with the clerk the sum of one hundred and fifty dollars in money.] (*a*)

Proviso.

Supplement.

P. L. 1892, p. 412.

Approved April 8, 1892.

Payment to judgment creditors may be made from surplus money from sales in chancery.

168. SEC. 1. That whenever any lands shall have heretofore been or shall hereafter be sold by virtue of any order or decree of the court of chancery, and there shall be a surplus arising from such sale which shall be deposited in said court, and any person or persons or corporation shall, theretofore or thereafter, obtain judgment in any of the courts of this state against the owner or owners of said lands so ordered to be sold, or any other person or persons who shall be entitled to such surplus money, or any part thereof, it shall and may be lawful for, and the chancellor is hereby authorized, empowered and directed, upon petition filed by or in behalf of such judgment creditor or creditors, and upon due proof made to the satisfaction of the chancellor that the residence of the person entitled to such surplus moneys is unknown, and cannot be ascertained, to order and direct such surplus moneys so deposited, or so much thereof as may be necessary, be paid to such judgment creditor or creditors, in satisfaction of their said judgment, notwithstanding such creditor or creditors were not made parties defendant in said cause; that in such cases it shall not be necessary for the judgment creditor or creditors to apply to be admitted as parties defendant in said cause, but said petition shall be entitled in the cause out of which such surplus was realized; and that such proof as is by this act required, may be by affidavit, or otherwise, as the chancellor shall direct.

(*a*) 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. A complainant who is a non-resident, will not be required to give security for costs, if he is joined with a resident complainant. *Jones* v. *Knauss*, 6 *Stew.* 188. If a defendant after he has notice that the complainant is non-resident, takes any step in the cause, he waives his right of security for costs. *Shuttleworth* v. *Dunlop* 7 *Stew.* 488.

169. SEC. 2. That all acts and parts of acts inconsistent with the provisions of this act, be and the same are hereby repealed, and that this act shall take effect immediately. Repealer.

Supplement.

Approved January 31, 1893. P. L. 1893, p. 14.

170. SEC. 1. That the vice chancellors of this state shall each be entitled to receive an annual salary at the rate of nine thousand dollars and no more; said salaries shall be paid in equal monthly payments by the treasurer of this state on the warrant of the comptroller of the treasury, and shall be in full of all services to be rendered by said officers respectively, and neither of said officers shall be entitled to any per diem or other allowance over and above said salaries. Annual salary of vice chancellors.

171. SEC. 2. That all acts or parts of acts inconsistent with the provisions of this act are hereby repealed, and that this act shall take effect immediately. Repealer.

Amendatory act.

Approved March 10, 1893. P. L. 1893, p. 199.

172. SEC. 1. That section eighteen of the act to which this is amendatory be and the same is hereby amended to read as follows:

[That in case of a bill filed against any defendant against whom a subpœna 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 one nor more than three months from the date of such order; (*a*) of which order such notice as the chancellor shall by rule direct shall, within ten 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 four weeks successively, at least once in each week; 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, (*b*) 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; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the chancellor, if he shall think proper, and on proof of personal service, or the publication and the mailing of said notice, as aforesaid, and of the performance of the direction 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 procure documents, depositions, exhibits, or other evidence to substantiate and prove the allegations in the

Notice to absent defendants to plead, answer or demur to bill filed.

405–172
18D–598

Publication of.

Decree pro confesso against, or proofs may be required.

(*a*) So, where a husband had separated from his wife, and he resided out of the state, service on her at her domicil was held insufficient. *McPherson* v. *Housel*, 3 *Beas.* 35. Issuing a subpœna 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.* 531.

(*b*) 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.

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; and that the provisions of this section shall apply to petitions and bills for divorce.]

173. SEC. 2. That the nineteenth section of the said act be amended to read as follows:

Defendant bound by decree as if served with process within the state.

[That any defendant upon whom such notice is served as herein directed shall be bound by the decree in such case as if he were served with process within the state, (*a*) but in such 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 ten 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.]

Security, when may be required.

174. SEC. 3. That the twenty-fourth section of the said act be amended to read as follows:

Plea or demurrer, when to be filed.

[That when a subpœna 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 subpœna acknowledged, as hereinbefore mentioned, the defendant shall file his plea or demurrer to the bill of complaint within thirty days from the return day of the subpœna, 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.]

175. SEC. 4. That the twenty-fifth section of the said act be amended to read as follows:

Answer, when to be filed.

[That the answer to any bill in chancery shall be filed within thirty days from the return day of the subpœna, in case no plea or demurrer be filed, unless further time be granted.] (*b*)

176. SEC. 5. That the thirty-first section of the said act be amended to read as follows:

If plea or demurrer overruled, answer must be filed.

[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 twenty 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*)

Entering of appearance by defendant shall not stay execution.

177. SEC. 6. That in any suit hereafter commenced the entering of an appearance by a defendant shall not operate to stay the issuing of an execution therein.

Suits heretofore commenced not affected.

178. SEC. 7. That this act shall take effect immediately, but shall not affect any suit heretofore commenced; and that all acts and parts of acts inconsistent herewith be and the same are hereby repealed.

Repealer.

Supplement.

P. L. 1893, p. 256.

Approved March 13, 1893.

Proceedings where it cannot be ascertained whether absent defendant is alive, or if dead, names and residences of heirs or personal representatives not known.

179. SEC. 1. That in all actions hereafter commenced in the court of chancery of New Jersey, by bill, petition, or otherwise, whenever it shall appear by the allegations of the said bill or petition, duly verified by the affidavit of the complainant or petitioner, or by one of them, if there shall be more than one complainant or petitioner, or his or their agent or solicitor, thereto annexed, that any person mentioned in said bill or petition,

(*a*) A decree pronounced against an absent defendant who had been notified of the suit in the manner prescribed by the statute, is, in all respects, just as valid and effectual for all local purposes as a decree made against a defendant who has been brought into court by the personal service of process. *Mutual Insurance Co.* v. *Prince*, 16 *Stew.* 52.

(*b*) When the last day for filing an answer falls on a legal holiday, *e. g.*, Christmas, filing it on the next day on which the clerk's office is open will be sufficient. *Feuchtwanger* v. *McCool*, 2 *Stew.* 151.

(*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. *Seeley* v. *Price*, *Hal. Ch.* 231. See *Broadwell* v. *Denman*, 2 *Hal.* 278. *Kirkpatrick* v. *Corning*, 12 *Stew.* 22.

or his heirs, devisees or personal representatives, are proper parties defendant to said bill of complaint or said petition; and that the complainant, after diligent and careful inquiry therefor, made as in case of absent defendants, has been unable to ascertain whether such person is still alive, or if he is known or believed to be dead, has been unable to ascertain the names and residences of his heirs, devisees or personal representatives, or such of them as may be proper parties defendant as aforesaid, such action may proceed against such person by name, and his heirs, devisees and personal representatives, as in the case of absent defendants whose names are known; *provided, nevertheless*, that such notice as is now required by law to be published against absent defendants in default of personal service, addressed to such person by name, and to "heirs, devisees and personal representatives," and containing such further statements and giving such further time as the chancellor may by his order direct be first published and mailed in such manner as the chancellor may, by his order in said action, direct; and in case such person, or his heirs, devisees or personal representatives, shall not appear, plead, answer or demur within the time limited in said notice, or further allowed by the chancellor, if he shall think proper, on proof to the satisfaction of the chancellor of mailing and publication of said notice as directed; such action may proceed in all respects as if such person, or his heirs, devisees or personal representatives had been duly named and described and served with process of subpœna in said action, and had failed to plead, answer or demur to the complainant's bill of complaint, or petitioner's petition within the time thereto allowed by law.

Proviso.

Notice to heirs, &c., what to contain.

180. SEC. 2. That all such defendants, and all persons falling within the description of "heirs, devisees or personal representatives" of the defendant supposed to be dead as aforesaid, shall thereupon be bound by all orders and decrees in said cause as if they had been duly named and described and served with process in this state.

Such defendants, heirs, &c., bound by orders and decrees.

181. SEC. 3. That proofs may be made, costs allowed, security ordered and proceedings for restitution or other relief from said decrees and orders had in like manner as the same are now allowed by law in the case of absent defendants.

Proof, costs, &c., as in case of absent defendants.

182. SEC. 4. That all acts or parts of acts inconsistent with the provisions of this act be and the same are hereby repealed, and that this act shall take effect immediately.

Repealer.

Supplement.

Approved June 13, 1895. P. L. 1895, p. 819.

183. SEC. 1. That the clerk in chancery shall not be paid by the state any compensation or expenses for the arranging, labeling and docketing of the pleadings and other papers filed in the office of the clerk of the court of chancery, or for any other services required by chapter five hundred and ninety-eight of the laws of eighteen hundred and seventy-one, being the supplement of April sixth, one thousand eight hundred and seventy-one, to an act respecting the court of chancery; but all such services shall be rendered and performed by the clerk in chancery without compensation and at his own expense.

Clerk in chancery to receive no compensation for docketing, &c., papers.

Services to be rendered without compensation.

184. SEC. 2. That the clerk in chancery shall receive no compensation, nor any sum for expenses except for blanks and stationery, for services rendered by him in suits and proceedings commenced on behalf of the state to enforce the payment of taxes by corporations or to enjoin corporations from doing business because of the non-payment of taxes; but all services of the clerk in such suits and proceedings shall be rendered by the clerk without charge.

Clerk to receive no compensation in corporation cases.

XVI. Miscellaneous.

An act in relation to the practice in the court of chancery on bills of interpleader.

P. L. 1893, p. 251.

Approved March 13, 1893.

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R02-273

Counsel fee awarded to complainant on bill of interpleader.

185. SEC. 1. That in all cases in which the court of chancery shall decree an interpleader as between the defendants to a bill of interpleader, the said court shall award to the complainant a counsel fee commensurate with the service of his counsel in the cause, to be taxed in the bill of costs and collected therewith.

Chosen Freeholders.

I. GENERAL ACT TO INCORPORATE CHOSEN FREEHOLDERS, WITH SUPPLEMENTS.

1. Incorporation and names of boards.
2. General powers.
3. Process, how served on.
4. May raise money, for what.
5. May adjourn from time to time.
6. Annual meeting.
7. Director to be elected.
8. Amended by section 48.
9. Clerk to deliver papers to his successor.
10. Amended by section 56.
11. Penalty for non-attendance.
12. How money assessed and raised.
13. How, when tax required to be raised at different times.
14. Appeal from assessment.
15. Proceedings against delinquents.
16. Proof of demand required.
17. How justice to proceed.
18. How process to be executed.
19. Election and bond of county collector.
20. Vacancy may be supplied.
21. Officers to account and remedy against.
22. Liability of county collector.
23. When taxes collected to be paid.
24. When township responsible for money lost.
25. Duty and liability of township collector and constable.
26. County collector to pay to order of corporation.
27. Penalty for neglect or refusal.
28. Amended by sections 62 and 65.
29. Further duties of justices and constables.
30. Poorhouses.
31. By whom governed and regulated.
32. Poor, support and employment of.
33. Two counties may have one poorhouse.
34. May jointly procure materials.
35. And apportion expense.
36. Amended by section 49.
37. Term "township" construed.
38. Powers, &c., continued until organization of new board.
39. Lands, &c., vested in the board.
40. Less than quorum may adjourn.
41. Power to sell and convey.
42. When township may erect poorhouse. Exempt from other poor tax.
43. Publication of annual statement.
44. What annual statement to embrace.
45. Amended by sections 47 and 54.
46. Boards of chosen freeholders may purchase bonds of the county.
47. Amended by section 54.
48. Election of clerk of board.
49. Compensation of members of board.
50. At what meeting bills shall be ordered paid.
51. Amended by sections 53 and 68.
52. Chairman of committee of board may administer oaths to witnesses.
53. Amended by section 68.
54. County collector to publish annual statement.
55. Repealer.
56. Clerk to call special meetings of board.
57. County courts may be provided with reports and text-books.
58. Term of office of freeholders.
59. Repealer.
60. State publications to be sent to clerks of counties having law libraries.
61. Chosen freeholders to provide books and stationery for courts and county officers.
62. Amended by section 65.
63. Repealer.
64. Investment of moneys in sinking fund.
65. County collectors' fees.
66. Repealer.
67. Term of office of county auditor.
68. Chosen freeholders to subscribe an official oath.

II. CLASSIFIED COUNTIES.

69. Counties, how classified.
70. Classes distinguished by population.
71. What a sufficient classification in any law.

(A) ACTS RELATING TO COUNTIES OF THE FIRST CLASS.

72. Appropriation for construction, &c., of public hospital.
73. Annual appropriation and by whom expended.
74. County board of health to have exclusive charge of expenditures.
75. When board may issue bonds for hospital.
76. Repealer.
77. May pay claims of newspapers for printing minutes in certain cases.
78. How boards constituted.
79. Meeting for organization.
80. Compensation of members, &c.
81. Vacancies, how filled.
82. All laws in force, not conflicting, to apply.
83. Powers, authority, &c.
84. Terms of members now in office, when to expire.
85. Terms of present officers, when to expire.
86. Repealer.

(B) ACTS RELATING TO COUNTIES OF THE SECOND CLASS.

87. Terms of office of solicitor and clerk.
88. Monthly statement of expenditures to be published.
89. Designation of newspapers to publish.
90. Repealer.
91. May issue bonds to build bridges.
92. Payment of same to be provided by taxation.
93. May erect county buildings.
94. Board shall appoint building commission.
95. Organization and powers of commissioners.
96. May issue bonds for such purpose.
97. Form and condition of bonds.
98. Principal and interest to be provided for.
99. Work to be done by contract.
100. Repealer.