

No. III.

EQUITY—
SPECIAL CASES.

An Act to diminish the delay and expense of proceedings in the Supreme Court in its jurisdiction as a Court of Equity and in Infancy and Lunacy. [27th July, 1852.]

WHEREAS it is expedient to diminish the delay and expense of proceedings in the Supreme Court in its jurisdiction as a Court of Equity and in Infancy and Lunacy Be it therefore enacted by His Excellency the Governor of New South Wales by and with the advice and consent of the Legislative Council thereof as follows:—

Power to persons interested in questions to state special cases for the opinion of the Court.

1. It shall be lawful for persons interested or claiming to be interested in any question cognizable in the said Court as to the construction of any Act of Parliament Act of Council will deed or other instrument in writing or any article clause matter or thing therein

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therein contained or as to the title or evidence of title to any real or personal estate contracted to be sold or otherwise dealt with or as to the parties to or the form of any deed or instrument for carrying any such contract into effect or as to any other matter falling within the jurisdiction of the said Court as a Court of Equity or in infancy or lunacy or made subject to the jurisdiction or authority of the said Court as a Court of Equity by any Statute or Act of Council and including among such persons all lunatics married women and infants in the manner and under the restrictions hereinafter contained to concur in stating such question in the form of a special case for the opinion of the said Court and it shall also be lawful for all executors administrators and trustees to concur in such case.

2. The committee of the estate of any lunatic interested or claiming to be interested in any such question as aforesaid may after having been authorized in that behalf by the Judge acting as Primary Judge in Equity concur in such case in his own name and in the name and on the behalf of the lunatic.

How Lunatic may concur.

3. A husband interested or claiming to be interested in right of his wife in any such question as aforesaid may concur in such case in his own name and in the name of his wife where the wife has no claim to any interest distinct from her husband and that a married woman having or claiming any interest in any such question as aforesaid distinct from her husband may in her own right concur in such case Provided that her husband also concurs therein.

How married women may concur.

4. The guardian of any infant interested or claiming to be interested in any such question as aforesaid may concur in such case in the name and on the behalf of the infant unless such guardian has an interest in such question adverse to the interest of the infant therein.

How infant may concur.

5. It shall be lawful for the said Court by order to be made in the matter of any lunatic not found such by inquisition or in the matter of any infant upon the application of any person on the behalf of such lunatic or upon the application of such infant by motion or petition to appoint any person shewn by affidavit to be a fit person and to have no interest adverse to the interest of the lunatic or infant to be the special guardian of such lunatic or infant for the purpose of concurring in such case in the name and on behalf of the lunatic or infant and any such person so appointed may lawfully so concur Provided always that it shall be lawful for the said Court to require notice of such application to be given to such person if any as the Court shall think fit.

How special guardian to be appointed for a lunatic not found such by inquisition and for infant.

6. In any case in which any such order as aforesaid shall have been made by the said Court in the matter of any infant without notice to the guardian of the infant it shall be lawful for the said Court if it shall think fit so to do to discharge such order upon the application of such guardian by motion or petition and the said Court if it shall think fit may thereupon appoint some other fit person to be the special guardian of such infant for the purpose of such special case and may also give such directions as may be necessary for substituting in such special case either the name of the guardian so applying or of the special guardian so appointed in lieu of the name of the special guardian so displaced Provided always that the discharge of any order appointing a special guardian shall not invalidate anything which shall in the meantime have been done by such special guardian unless the Court shall upon notice to all parties specially so direct.

Order to appoint special guardian of infant may be discharged.

If made without notice.

7. Every such special case shall be entitled as a cause between some or one of the parties interested or claiming to be interested as plaintiffs or plaintiff and the others or other of them as defendants or defendant and that in the title to such cases lunatics and infants shall

How such special cases to be entitled.

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shall be described as such and their committees guardians or special guardians named and that where in any such case a married woman is named as a plaintiff and her husband as a defendant thereto a next friend of such married woman shall be named in the title to such case.

Form of special case.

8. Every such special case shall concisely state such facts and documents as may be necessary to enable the Court to decide the question raised thereby and that upon the hearing of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference which the Court might have drawn therefrom if proved in a cause.

Case to state how guardian constituted and the concurrence of married women.

9. Every such special case to which an infant or lunatic is a party by his guardian or special guardian shall also state how such guardian or special guardian was constituted and that where any married woman having or claiming any interest distinct from her husband is a party to such case it shall be stated therein that she concurs in such case in her own right.

Case to be signed by counsel and filed and appearances entered by defendants.

10. Every such special case shall be signed by counsel for all parties and shall be filed in the same manner as bills are filed and that the defendants may appear thereto in the same manner as defendants appear to bills and that no defendant shall be required to take an office copy of a special case but an office copy thereof shall be taken by the plaintiff.

After case filed and appearance by defendant parties to be bound except that married women infants and lunatics are not to be bound by statements in case till leave given to set it down.

11. After a special case shall have been filed and the defendants shall have appeared thereto all the parties to such special case shall be subject to the jurisdiction of the Court in the same manner as if the plaintiff in the special case had filed a bill against the parties named as defendants thereto and such defendants had appeared to such bill and upon the special case being filed and appearances entered thereto as aforesaid all parties to such special case other than married women infants and lunatics shall for the purposes of such special case be bound by the statements therein and that married women infants and lunatics made parties to a special case shall for the purposes of such special case be bound by the statements therein when and not before leave shall have been given by the Court to set down such special case in manner hereinafter provided.

How case to be set down for hearing.

12. So soon as all the defendants shall have appeared to the special case the same may subject to the provisions hereinafter contained be set down for hearing and subpoenas to hear judgment issued and served according to the practice of the said Court.

When a married woman infant or lunatic is a party application to be made to the Court for leave to set the case down.

13. When any married woman infant or lunatic is party to a special case application may be made to the Court by motion for leave to set down the same of which motion notice shall be given to every party to such case in whom as executor administrator or trustee any property in question therein is or is alleged to be vested in trust for or for the benefit of such married woman infant or lunatic and also if such application be not made by or on behalf of such married woman infant or lunatic to such married woman and her husband or to such infant or to such lunatic and his committee if any as the case may be and that upon the hearing of such motion the said Court may give leave to set down such case if it shall be of opinion that it is proper that the question raised therein shall be determined thereon and shall be satisfied by affidavit or other sufficient evidence that the statements contained therein so far as the same affect the interest of such married woman infant or lunatic are true but otherwise may refuse such application Provided always that in case the said Court upon the hearing of such application shall be of opinion that it is proper that the question raised in such case shall be determined thereon but shall not

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not be satisfied that the statements contained therein so far as they affect the interest of such married woman infant or lunatic are true it shall be lawful for the said Court to refer it to one of the Masters thereof to make such inquiries as to the Court shall seem proper and upon further application being made by motion as aforesaid upon the said Master's report to give or refuse leave to set down such case as to the said Court shall seem fit.

14. It shall be lawful for the said Court upon the hearing of any such special case as aforesaid to determine the questions raised therein or any of them and by decree to declare its opinion thereon and so far as the case shall admit of the same upon the right involved therein without proceeding to administer any relief consequent upon such declaration and that every such declaration of the said Court contained in any such decree shall have the same force and effect as such declaration would have had and shall be binding to the same extent as such declaration would have been if contained in a decree made in a suit between the same parties instituted by bill. Upon hearing Court to determine question and make declaration. Provided always that if upon the hearing of such special case as aforesaid the Court shall be of opinion that the questions raised thereby or any of them cannot properly be decided upon such case the said Court may refuse to decide the same. Provide that Court may refuse to decide.

15. Every executor administrator trustee or other person making any payment or doing any act in conformity with the declaration contained in any decree made upon a special case shall in all respects be as fully and effectually protected and indemnified by such declaration as if such payment had been made or act done under or in pursuance of the express order of the said Court made in a suit between the same parties instituted by bill save only as to any rights or claims of any person in respect of matters not determined by such declaration. Protection afforded to persons acting under declaration.

16. Where any person shall be desirous to have a special case re-heard or to appeal from the decision thereon it shall be lawful for the said Court upon application for that purpose either at the time of the decree upon such special case being made or at any time afterwards and upon such conditions if any as the Court shall think fit to order that the declaration contained in such decree shall not be acted upon for such time as the said Court shall think just. The Court may suspend the acting upon declaration.

17. The filing of a special case and the entering of appearances thereto by the persons named as defendants therein shall be taken to be a *lis pendens*. Special case to be a *lis pendens*.

18. Any documents referred to in a special case and any copies thereof or extracts therefrom identified by the signature of the solicitors for all parties or of the Sydney agents of such solicitors may be produced and read at the hearing of such case without further proof and that it shall be lawful for the said Court at any time after the filing of the special case and the entering of appearances thereto by the persons named as defendants therein to order any document which may be admitted thereby to be in the possession of any party to such case to be deposited and produced in such manner and for such purposes as the Court shall think fit. Mode of identifying documents and Court may order production.

19. And whereas it is expedient to provide means for enabling executors or administrators of deceased persons to ascertain whether there are any outstanding debts or liabilities affecting the personal estates of such persons without the delay and expense of suits to administer such estates it shall be lawful for the said Court upon the application of the executors or administrators of any deceased person by order to be made upon motion or petition of course and to be in the form or to the effect set forth in the Schedule hereto with such variations as circumstances may require to refer it to the Master in Equity Court on application of executors or administrators may by order of course direct it to be referred to a Master to take an account of debts and liabilities.

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Equity of the said Court to take an account of the debts and liabilities affecting the personal estate of such deceased person and to report thereon Provided always that no such order shall be made until the expiration of one year next after the death of such deceased person or pending any proceedings to administer the estate of such person and that in case at any time after the making of such order any decree or order for administering the estate of such deceased person shall be made it shall be lawful for the said Court by such decree or order to stay or suspend the proceedings under such order of course on such terms and conditions if any as to the said Court shall seem just.

Master's report may be objected to by motion upon notice.

20. It shall be lawful for any person who may have come in before the Master under any such order and claimed to be a creditor upon the estate of the deceased person or to have any demand upon such estate by reason of any liability and whose debt or claim may not have been wholly allowed by the said Master to apply to the said Court by motion of which notice shall be given within fourteen days after the filing of the Master's report to have such claim allowed by the Court either wholly or partially and it shall be lawful for the said executors or administrators and for any creditor of the deceased person who may be authorized by special leave of the said Court so to do to apply to the said Court by motion of which notice shall be given within the time aforesaid to have any debt or claim allowed by the said Master disallowed by the Court either wholly or partially and at the expiration of fourteen days after the filing of the said report the same shall except as to any debt or claim as to which any such notice as aforesaid may have been given be absolute as if the same had been confirmed by order of the Court.

Proceeding of the Court on such motion.

21. Upon the hearing of any such motion as aforesaid the said Court may either dismiss such motion or may order the debt or claim to which such motion relates to be allowed or disallowed as the case may be and either wholly or partially or may direct further inquiry or further proceedings by way of action or otherwise touching such debt or claim and after such inquiry or proceedings may upon further motion deal with such debt or claim as to the said Court shall seem just Provided always that no new evidence shall be received by the said Court upon the hearing of any such motion without special leave of the said Court.

If debts or certain liabilities allowed and not paid or provided for order may be made for payment or for taking accounts.

22. In case any debt or any certain liability shall have been allowed as aforesaid and shall not within fourteen days after the report has become absolute as to such debt or liability or after the same shall have been allowed by the said Court be paid or provided for by appropriation to the satisfaction of the person who has established such liability it shall be lawful for the said Court by order to be made in case of any debt remaining due upon the application by motion or petition of the person to whom the debt remains due and on notice to the executors or administrators and in case of any certain liability remaining unprovided for by appropriation upon the application by motion or petition of the person by whom such liability has been established or of the executors or administrators and on notice by the party applying to the other of them to order payment of the debts which may have been allowed and remain unpaid and to provide for the certain liabilities which may have been allowed and remain unprovided for in like manner as the same could or might have been paid or provided for in a suit for that purpose instituted by bill or to refer it to the Master to take an account of the debts and certain liabilities allowed as aforesaid which remain unpaid or unprovided for and also the usual accounts of the personal estate of the deceased person with all usual and proper directions and every such order shall have the

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the same force and effect and shall be prosecuted and carried on in like manner as a decree in a creditor's suit instituted by bill.

23. In case any contingent liability shall be allowed by the said report or by the said Court it shall be lawful for the said Court by order to be made upon the application of the executors or administrators by motion or petition on notice to the person who may have established such contingent liability to order such sum of money part of the estate of the deceased person as to the said Court shall seem just to be set apart and appropriated for answering such contingent liability and to give such directions as the said Court shall think fit touching the payment of such sum of money into Court and the investment thereof and the payment application or accumulation of the interest or dividends thereof in the meantime and until the same shall be required to answer such liability and when such liability shall be ascertained or determined to give such directions as to the payment of such sum out of Court as the said Court shall deem right Provided always that no order to be made as aforesaid shall in any manner bind the assets so appropriated as against the persons entitled to the estate of the deceased subject to the contingent liability and any person interested in such appropriated assets may apply to the Court touching the same as he may be advised.

Court on the application of executors or administrators may direct appropriation of money to answer contingent liability.

24. After the filing of such report as aforesaid it shall be lawful for the said Court upon the application of the executors or administrators of the deceased by order to be made on motion to restrain by injunction any proceedings at law against them by any person having or claiming to have any demand upon the estate of the deceased by reason of any debt or liability other than the persons who may have established contingent liabilities under the said order for which no appropriation may have been made.

Court may restrain proceedings against executors and administrators.

25. In case no debt or liability or no debt or liability other than a contingent liability shall have been allowed as aforesaid or in case any debt or liability other than as aforesaid shall have been allowed as aforesaid then after the same shall have been paid or provided for by appropriation as aforesaid all payments made by the executors or administrators or any of them on account of the estate of the deceased person and all dispositions of such assets made by them on account of such estate shall as against all persons having or claiming to have any demand upon such estate by reason of any debt or liability other than persons who may have established under the said order any contingent liability for which no such appropriation as aforesaid may have been made be as good and effectual as if the same had been made under a decree of the said Court Provided always that nothing herein contained shall in any manner affect or prejudice the rights of any creditor or other person having any demand or claim upon the estate of the deceased against any assets so paid or disposed of or against the persons to whom such payment or disposition may have been made or against any assets appropriated under the provisions of this Act and the appropriation of which if made under a decree of the said Court in a suit to which he was not a party would not have been binding upon him.

Protection afforded to executors and administrators.

26. Notwithstanding any rule or practice of the said Court to the contrary it shall be lawful for the said Court at the hearing of any cause or of any further directions therein to receive proof by affidavit of all proper parties being before the Court and of all such matters as are necessary to be proved for enabling the said Court to order payment of any moneys belonging to any married woman and of all such other matters not directly in issue in the cause as in the opinion of the said Court may safely and properly be so proved.

Power for Court notwithstanding any rule &c. to the contrary to receive proof by affidavit.

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Power to Judges to make general rules and orders from time to time.

27. It shall be lawful for the Judges of the said Court from time to time to make rescind and alter general rules and orders for better enabling the opinion of the said Court to be obtained on special cases and for effectuating the purposes of this Act as to the debts and liabilities of deceased persons and for making any provisions which may be or be deemed necessary or proper as to amendment revivor and supplemental matter or relief and as to costs of any proceedings under or in pursuance of this Act and for regulating the times and form and mode of procedure and generally the practice of the said Court in respect of the matters to which this Act relates and every of them and so far as may be found expedient for altering the course of proceeding hereinbefore prescribed in respect to such matters or any of them.

Rules and orders to be laid before the Legislative Council and to be binding from the time appointed or from the making unless objected to by vote of the Legislative Council.

28. All such general rules and orders shall be laid before the Legislative Council if the same shall be then sitting immediately upon the making and issuing the same or if the same shall not be then sitting then within five days after the next meeting thereof and that every such rule or order shall from and after the time in that behalf to be appointed by the said Judges and if no time shall be so appointed then from and after the making thereof be binding and obligatory on the said Court and be of like force and effect as if the provisions therein contained had been expressly enacted herein Provided always that if the said Legislative Council shall by any resolution passed at any time before such House shall have actually sat thirty-six days after such rules orders and regulations shall have been laid before such House resolve that the whole or any part of such rules or orders ought not to continue in force in such case the whole or such part thereof as shall be so included in such resolution shall from and after such resolution cease to be binding and obligatory on the said Court Provided also that no such rule or order as aforesaid shall by virtue of this Act be of the like force and effect as if the provisions therein contained had been expressly enacted by the Governor and Legislative Council unless the same shall be expressed to be made in pursuance of this Act and that every such rule or order so expressed to be made in pursuance of this Act which shall not be laid before the Legislative Council within the time by this Act limited for that purpose shall from and after the expiration of such time be absolutely void and of no effect.

Rules and orders not laid before the House within time limited to be void.

Until rules made and if not applicable proceedings to be according to this Act and practice of the Court in suits by bill.

29. In the meantime and until any such general rules or orders shall be made and in so far as the same when made shall not be applicable the proceedings under this Act shall be governed and regulated by the provisions herein contained so far as the same extend and in so far as the same do not extend shall as well with respect to the persons who ought to be made parties to special cases as in every other respect be governed and regulated by the rules orders and practice of the said Court in suits instituted by bill so far as the same can be applied thereto and subject to such general rules and orders as aforesaid the costs of all proceedings under this Act shall be in the discretion of the said Court.

Case may be set down either before Primary Judge or full Court subject to removal.

30. Every such special case as aforesaid shall be set down for hearing before the Primary Judge in Equity and the same and all matters and questions arising out of the same shall be heard and determined by such Primary Judge or during his illness or absence by one other of the Judges of the said Court in the same manner as the ordinary equitable jurisdiction of the said Court is now exercised in cases where bills have been filed.

Decrees and orders to be subject to appeal &c.

31. All decrees and orders made under the provisions of this Act shall be subject to re-hearing appeal and review and may be discharged

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charged and varied in the same and the like manner as decrees and orders of the said Court made in suits instituted by bill.

32. In construing this Act—

The word “lunatic” shall include idiots and persons of unsound mind and whether found such by inquisition or not.

The word “guardian” shall mean father or testamentary guardian or guardian appointed by the Supreme Court (not being a special guardian appointed under the provisions of this Act).

Interpretation of terms.

SCHEDULE REFERRED TO BY THE FOREGOING ACT.

“In the Supreme Court of New South Wales.”

[Date.]

In the matter of A. B. late of _____ in the County
of _____ Banker [or as the case may be] deceased.

UPON motion this day made unto this Court by Mr. _____ of Counsel for C. D. of _____ the executor [or administrator] of the above-named A. B. [or upon the humble petition of C. D. of _____ the executor (or administrator) of the said A. B. this day preferred unto the said Court it is Ordered That it be referred to the Master in Equity of this Court to take an account of the debts and liabilities affecting the personal estate of the said A. B. and to compute interest on such of the said debts and liabilities as carry interest after the rate of interest the same respectively carry and the said Master is to cause an advertisement to be published in the *New South Wales Government Gazette* and such other public papers as he shall think fit for the persons claiming in respect of any such debts or liabilities to come in before the said Master and prove their debts and claims and he is to fix a peremptory day for that purpose and such of the said creditors as shall not come in and prove their debts and claims by the time so to be limited are to be excluded the benefit of this Order And it is Ordered that the said Master do distinguish debts from liabilities and liabilities certain from liabilities contingent And it is Ordered that the personal estate of the said A. B. be applied in payment and satisfaction of such debts and liabilities of the said A. B. in a due course of administration and for the better taking the said accounts and discovery of the matters aforesaid the parties are to produce before the said Master upon oath all deeds books papers and writings in their custody or power relating thereto and are to be examined upon interrogatories as the said Master shall direct and any of the parties are to be at liberty to apply to the Court as there shall be occasion.
