

**THE COMMON LAW  
PROCEDURE ACT, 1854,  
(17 & 18 VICT., CAP. 125,)  
WITH PRACTICAL NOTES**

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The Common Law Procedure Act, 1854, (17 & 18 Vict., Cap. 125,) with Practical Notes by  
Robert Malcolm Kerr

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THE  
**Common Law Procedure Act,**  
1854,

(17 & 18 VICT., CAP. 125.)

WITH PRACTICAL NOTES:

AND

INTRODUCTION,

EXPLAINING THE NATURE AND EXTENT OF THE EQUITABLE  
JURISDICTION CONFERRED ON THE SUPERIOR COURTS OF  
COMMON LAW; THE CHANGES EFFECTED IN THE LAW  
OF EVIDENCE; AND THE ALTERATIONS  
IN PRACTICE INTRODUCED  
BY THE STATUTE:

AND

A Copious Index.

BY

ROBERT MALCOLM KERR,

BARRISTER-AT-LAW.



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1854.

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## P R E F A C E.

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IN the preparation of this volume I have followed, as closely as the nature of the work permitted, the general plan of my edition of "The Common Law Procedure Act, 1852."

In the Introduction, I have endeavoured to give an outline of the many important changes introduced by the statute.

In pointing out, in the first four chapters, the nature of that extension of jurisdiction, which is the most prominent feature of the Act, my object has been to explain, as well the reasons which led to, as the extent of, the powers now conferred on the Superior Courts of Common Law. For while the performance of contracts and duties, which these

Courts may now compel, is not so extensive as the specific performance which may be decreed by a Court of Equity, the discovery they may obtain for a suitor seems to be practically as unlimited. The repetition of wrongful acts, arising out of a breach of contract, may be restrained; but an injunction cannot yet be obtained in Courts of Law, in the many cases of threatened injury and doubtful legal right, in which the Court of Chancery at once interferes; and the Legislature, while it enables a defendant to plead an equitable defence, has thrown a doubt on the propriety of its own act, by a presumption, that some at least of such defences cannot be dealt with by the Courts, it has authorized to receive and give effect to them.

The fifth chapter relates chiefly to the Law of Arbitration, which has been in some respects altered and improved. In this chapter, I have taken the opportunity of mentioning the change, which has been made in the rule of practice, as to the addresses of counsel to the jury. It is difficult to find the reason for confining this alteration in practice to the proceedings before a jury. If the system in operation



was objectionable (and the Commissioners state their opinion very strongly that it was so), the change ought to have been extended, like the alterations in the Law of Evidence, "to every Court of Civil Judicature in England and Ireland." This has not been done, nor has the change of system been extended to the proceedings on a trial by a judge without a jury; so that unless the judges interfere to make the practice uniform, two rules of practice will be in force in Westminster Hall.

In the sixth and seventh chapters I have attempted an analysis, of the proceedings on appeals on motions for a new trial, or to enter a verdict or nonsuit;—of the new process of execution by the attachment of debts;—and of the procedure for the examination of unwilling witnesses.

The ninth chapter is devoted to a statement of the important alterations which have been made in the Law of Evidence; and in the last chapter I have called attention to the amendments in existing procedure effected by the statute.

A list of ten chapters may excite, not unnaturally, an expectation that the various matters of

which they form the subject have been treated fully and in detail. Any such expectation must be disappointed, for this sub-division has been adopted solely with a view to precision and brevity. If "a great book is a great evil," the evil is most felt in the case of a law-book, which I think cannot be too concise consistently with accuracy.

It is principally to those sections of the statute which alter, modify, or amend the proceedings in personal actions, that I have appended any Notes. The effect of an alteration in the law, as in anything else, may be best learned by considering what the rule was before the change was introduced. With this view I have stated more fully than in other instances, but I trust usefully, the reasons which have led to the several amendments in the Law of Evidence effected by the statute.

I need scarcely remind the reader that an edition of so important a measure as "The Common Law Procedure Act, 1854," can make no pretensions to be either a treatise on jurisdiction, or a handbook of practice. Not only is the extent of the jurisdiction, which has been conferred on the Courts of Common

Law, for book-writing purposes altogether undefined ; but much of the procedure, " for the effectual execution " of the Act, and of " the intention and object " thereof, has yet to be framed. An outline of the changes effected by the statute, seems as much as can, in the circumstances, be reasonably expected from an editor.

I have endeavoured to make the Index as complete as possible.

In the Preface I may be permitted a word or two of criticism, merely to call attention to the fact, that the " amendment " section and the " interpretation clause," in this statute, differ from the analogous provisions of " The Common Law Procedure Act, 1852." The differences may be unimportant in themselves, but in principle they are indefensible, and may in practice give rise to many difficulties. These defects might have been passed over, were it not that one other section of the statute betrays an amount of carelessness, which is not very creditable to the framers of the measure. I allude to the 88th section, which professes to vest in the Superior Courts of Law or any judge thereof, the same jurisdiction " as may be