

Acts of the General Assembly of Her Majesty's Province of New-Brunswick passed in the year 1858. Fredericton, NB: John Simpson, Printer to the Queen's Most Excellent Majesty, 1858.

21 Victoria – Chapter 21

An Act relating to the Action of Ejectment. Passed 6th April 1858.

Section.

1. Present mode of proceeding abolished.
2. Proceedings to commence by summons; form and service.
3. Form of declaration in ejectment.
4. Meane profits, when recoverable.
5. Leave by a judge to defend, though not named in the Writ.
6. Defence may be limited to a part of the property.
7. Description of property in declaration may be amended.
8. Appearance and defences by persons not in possession.
9. Plaintiff to recover if no appearance is entered or defence is limited;
10. Special case by consent.
11. Plea by defendant, and question at trial.
12. Judge may order trial to be had in other County than where venue is laid.

Section.

13. Judgment and execution for either party.
 14. Action and defence by joint tenants, &c.; ouster an additional question.
 15. One of several plaintiffs may discontinue
 16. Plaintiff may discontinue as to one or more of the defendants.
 17. Effects of judgment to be as heretofore.
 18. Tenants having knowledge of Writ of Ejectment, to notify Landlord or Receiver.
 19. Improvements may be set off against mesne profits.
 20. Not necessary to prove right of entry, unless, &c.
 21. Title obtained while another in possession, no preclusion.
 22. Tenant not barred from defending.
 23. Form of Execution in ejectment.
- Schedule.

Be it enacted by the Lieutenant Governor, Legislative Council, and Assembly, as follows:—

1. That the mode of proceeding in Ejectment as at present practised in this Province, be and the same is hereby abolished; provided always, that nothing herein contained shall extend or be construed to extend to actions of Ejectment now pending, but the same may be prosecuted in all respects as if this Act had not been passed, any thing herein contained to the contrary thereof in any wise notwithstanding.

2. In the action of Ejectment the proceedings shall be commenced by a writ of summons as given in the Schedule of this Act and numbered 1, which shall be made returnable and served as other writs, but in cases of vacant possession it shall be served by posting a copy thereof upon the door of the dwelling house or other conspicuous part of the property, and by publishing a copy of the same for at least one month in some Newspaper published in the County where the property is situate, and if no Newspaper be published in such County, then for a like space of time in the Royal Gazette.

3. The declaration in Ejectment shall be in the form as given in number 2 in the said Schedule, and the general proceedings to judgment shall be the same as near as may be as in other actions, subject only to the provisions hereinafter mentioned.
4. The plaintiff may in the action of Ejectment, in addition to the property, recover for the mesne profits, which shall include the value of any lumber or other valuable article taken from the land; and if the plaintiff make no claim at the trial for mesne profits, or after interlocutory judgment proceed to final judgment without issuing a writ of enquiry to assess damages therefor, he shall be barred from recovering the same; and the particulars of mesne profits, when claimed, shall be annexed to the declaration, and copy served.
5. Any person not named in the writ may, by leave of a Judge, appear and defend, on filing an affidavit, shewing that he is in possession of the land either by himself or his tenant; and when he appears to defend as landlord when in possession of property only by his tenant, shall state in his appearance that he appears as landlord, and shall set up no other matters of defence than a landlord in an Ejectment has heretofore been allowed.
6. Any person appearing to the action, may limit his defence to a part only of the property mentioned in the declaration, describing the same with reasonable certainty in the plea.
7. A Judge may at any time, on the application of either party, amend the description of the property in the declaration or plea, upon such terms as he may direct; and want of reasonable certainty in the description of the property, or mesne profits in the declaration or bill of particulars annexed mentioned or in the plea, shall be a ground only for an application to a Judge for better particulars of the land claimed or defended, or of the mesne profits, an order for which a Judge may make.
8. A Judge may strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants.
9. If no appearance be entered in time, or if an appearance be entered and the defence be limited to part only, the plaintiff shall be entitled to judgment and recover possession of the land, or of the part thereof to which the defence does not apply; if there be no appearance, and the plaintiff claims mesne profits, he shall proceed by writ of enquiry to assess the same.
10. By consent of the parties and leave of a Judge, a special case may be stated according to the practice heretofore used.
11. The defendant shall be restricted to one plea as given in the said Schedule number 3, and the plaintiff, if no special case be agreed to, may proceed to trial upon the issue in the same manner as in other actions; and the question at the trial shall, except as heretofore mentioned, be whether the plaintiff's title be good or not, and if good whether to the whole or part, and if to part, then to which part, and also whether he be entitled to mesne profits or not, and the amount of the same, and the postea shall be according to facts.

12. A Judge may on the application of either party order that the trial shall take place in any County other than where the said venue is laid, and such order being suggested on the Record the trial may be had accordingly.

13. The judgment for either party may be signed pursuant to the finding of the Jury, and execution issue accordingly with costs.

14. On an action brought by some or one of several persons entitled as joint tenants, tenants in common, or co-parceners, any of them in possession may with the plea give notice that he defends as such, admitting the right of the plaintiff to an undivided share of the property, stating what share, but denying any actual ouster by him; and upon the trial of the issue the additional question of an actual ouster of the plaintiff shall be put to the Jury, and if it be proved that the defendant is joint tenant, tenant in common, or co-parcener with the plaintiff, and that there has been no actual ouster, the defendant shall have judgment and costs; but if it be found either that the defendant is not such joint tenant, tenant in common, or co-parcener, or that an actual ouster shall have taken place, the plaintiff shall have judgment for the recovery of possession and costs.

15. If one of several plaintiffs desire to discontinue, he may apply to a Judge to have his name struck out of the proceedings, who may make an order to that effect, upon such terms as he may direct, and the action shall proceed at the suit of the other plaintiff.

16. The plaintiff may at any time discontinue the action as to one or more of the defendants, by giving the defendant notice thereof and on payment of costs.

17. The effect of a judgment in an action of Ejectment under this Act shall be the same as heretofore.

18. Every tenant to whom any writ in Ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his landlord or receiver, or forfeit the value of three year's rent of the premises demised or holden in the possession of such tenant to the person of whom he holds, to be recovered in any Court of competent jurisdiction.

19. In an action for the recovery of land which shall have been occupied by the defendant with the knowledge of the plaintiff, the defendant shall be allowed to give evidence of the fair value of any improvements he may have made thereon, which shall be set off against the mesne profits, and for any excess a verdict may be given for either party, and judgment be rendered with costs, and execution issued accordingly.

20. On the trial of any action of Ejectment the plaintiff shall not be required to prove in addition to his title, any right of entry, unless it become necessary by some evidence of possession on the part of the defendant.

21. No person shall be precluded from recovering any land in Ejectment on the ground of his title having been obtained while some other person was in possession.

22. No tenant shall be barred from defending any action of Ejectment on the ground of his being such tenant, if at the time of the action brought he shall be clothed with the legal title.

23. The Execution in Ejectment shall be the Form in the Schedule to this Act numbered 4.

SCHEDULE.

Number 1.

To the Sheriff of _____ County

[L. S.] You are commanded to summon C. D. to appear before us at Fredericton on [here insert some return day] to answer A. B. in Ejectment for Lands situate in the Parish of _____, in the County of _____, and also for mesne profits, and have then there this Writ.

Witness, J.C., Esquire, at Fredericton, the ____ day of _____, A.D. 18____. [date of issue.]

Clerk

Number 2.

Declaration in Ejectment.

In the Supreme Court. Of _____ Term, 18 ____.

York, to-wit: A. B. by G. H. his Attorney (or in person) sues C. D., for that A. B. is entitled to the possession of certain Lands, situate in the Parish of _____, in the County of _____, and the defendant has possessed himself thereof, and the plaintiff claims to eject the defendant therefrom, and also claims £_____ according to the bill of particulars hereto annexed, for mesne profits.

L. M., Plaintiff's Attorney.

Number 3.

In the Supreme Court. _____ of Term, _____ 18 ____.

C.D.
ats.
A.B.

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The defendant, by E. F. his Attorney, (or in person,) defends the action, and says that he denies the plaintiff's title to * the land described in the plaintiff's declaration, [if to part only, down to asterisk describing the part, then "part of the land described in the plaintiff's declaration,"] and puts himself upon the country.

E. F., Defendant's Attorney.

Number 4.

Execution in Ejectment.

Victoria, &c. To the Sheriff of _____

[L.S.] We command you to put A. B. in immediate and peaceable possession of [here describe the lands recovered in Ejectment, as set out in the Judgment,] which A. B. has recovered in our Court in Ejectment against C. D., and you are also commanded to [here insert "take the body," or "levy on the goods and chattels, lands and tenements," of the said C. D. for _____ mesne profits,

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and _____ costs, as the case may be,] and make return of this Writ on [some return day
within a year from the day of issue.]

Witness J. C., Esquire, at Fredericton, the ___ day of _____ A. D. 18 ____ [date of issue.]
Clerk.