

Laws of Her Majesty's Province of Newfoundland, passed in the year 1849.

12 Victoria – Chapter 8

An Act for the further amendment of the Law, and the better advancement of Justice. (Passed 23d April, 1849.)

Whereas there is no remedy provided by law for injuries to the real estate of any person deceased, committed in his lifetime, nor for certain wrongs done by a person deceased, in his lifetime, to another, in respect of his property, real or personal: For remedy thereof,—

Be it enacted, by the Governor, Council and Assembly of Newfoundland, in Legislative Session convened, and by the authority of the same, that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration, as the simple contract debts of such person.

II. And be it further enacted, That no plea in abatement for the non-joinder of any person, as a co-defendant, shall be allowed in any Court of Common Law, unless it shall be slated in such plea that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea.

III. And be it further enacted, That to any plea in abatement in any Court of Law, of the non-joinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy or insolvency and certificate, or under an Act for the relief of insolvent debtors.

IV. And be it further enacted, That in all cases in which, after such plea in abatement, the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement, as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in abatement, are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the

other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the non-joinder of such person: Provided, that any such defendant who shall have so pleaded in abatement, shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement.

V. And be it further enacted, That no plea in abatement for a misnomer shall be allowed in any personal action, but that in all cases in which a misnomer would, but for this Act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended at the costs of the plaintiff, by inserting the right name, upon a Judge's, summons, founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit.

VI. And be it further enacted, That in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient; in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters, or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full.

VII. And be it further enacted, That an action of debt on simple contract shall be maintainable in any Court of Common Law against any executor or administrator.

VIII. And be it further enacted, That at any time after the passing of this Act either party in any action pending in any of the superior Courts, after plea pleaded and a reasonable time before trial, may give notice in writing to the other of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent by indorsement on such notice, within forty-eight hours, to make the admission specified, the party requiring such admission may call on the party required by summons to show cause before a Judge why he should not consent to such admission, or in case of refusal to be subject to pay the costs of proof; and unless the party required shall expressly consent to make such admission, the Judge shall (if he think the application reasonable) make an order that the costs of proving any document specified in the notice which shall be proved at the trial to the satisfaction of the Judge or other presiding officer, certified by his indorsement thereon, shall be paid by the party so required, whatever may be the result of the cause : Provided, that if the Judge shall think the application unreasonable he shall indorse the summons accordingly : Provided also that the Judge may give such time for inquiry or examination of the documents intended to be offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit.

IX. And be it further enacted, That it shall be lawful for the defendant in all personal actions (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecutions, criminal conversation, or debauchery of the plaintiff's daughter or servant), by leave of any Court of Record where such action is pending, or of a Judge of any such Courts, to pay into Court a sum of

money by way of compensation, or amends, in such manner and under such regulations as to the payment of costs, and the form of pleading, in so far as the same shall be applicable, as are now or may be adopted in that behalf in the practice of the Court of Queen's Bench.

X. And whereas great expense is often incurred, and delay or failure of justice takes place, at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record upon which the trial is had, in-matters not material to the merits of the case; and also by reason of variances as to some particular or particulars between the proof and the record or setting forth on the record or document on which the trial is had, of contracts, customs, names, and other matters or circumstances not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and the same cannot be amended at the trial; and whereas it is expedient to allow such amendments as hereinafter mentioned, to be made on the trial of the cause; be it therefore enacted, that it shall be lawful for any Court of Record holding plea in civil actions, if such Court shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such Court, in any civil action or any information in the nature of a quo warranto, or proceedings on a mandamus, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, or between the proof and the recital, or setting forth on the record, writ, or document, on which the trial is proceeding, of any contract, custom, name, or other matter, in any particular or particulars in the judgment of such Court not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution or defence, to be forthwith amended by such officer of the Court, or otherwise, both in the part of the pleadings where such variance occurs and in every other part of the pleadings which it may become necessary to amend, on such terms as to payment of costs to the other party, or postponing the trial to be had before the same or another Jury, or both payment of costs and postponement, as such Court shall think reasonable; and in case such variances shall be in some particular or particulars in the judgment of such Court not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such Court shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial, as aforesaid, as such Court shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and the order for amendment shall be entered on the roll or other document on which the trial shall be had.

XI. And be it further enacted, That the said Court shall and may, if they think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence, and thereupon such finding shall be stated on such record or document; and notwithstanding the finding on the issue joined, the said Court shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.

XII. And be it further enacted, That it shall be lawful for the parties in any action or information after issue joined, by consent and by order of any Judge of any such Court of Record as aforesaid, to state the facts of the case in the form of a special case for the opinion of the Court, and to agree that a judgment shall be entered for the plaintiff or defendant by confession or by nolle prosequi, immediately after the decision of the case, or otherwise, as the Court may think fit, and judgment shall be entered accordingly.

XIII. And whereas the enquiry after truth in Courts of Justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony: Be it therefore further enacted, That no person offered as a witness shall hereafter be excluded by reason of incapacity from interest, from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined or of any matter or question, or on an inquiry arising in any suit, action, or proceeding, civil or criminal, in any Court, or before any Judge, Jury, Sheriff, Coroner, Magistrate, Officer, or person having by law or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered, may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding, in which he is offered as a witness: Provided, that this act shall not render competent any party to any suit, action, or proceeding, individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person for whose immediate and individual benefit any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively, nor any person then undergoing sentence upon conviction of any crime which would now incapacitate him from being a witness: Provided, that in Courts of Equity any defendant to any cause pending in any such Court may be examined as a witness on the behalf of the plaintiff or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matters, or any of the matters, in question in the cause, shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness.

XIV. And be it further enacted, That wherever in any legal proceedings whatever, legal proceedings may be set out, it shall not be necessary to specify that any particular persons who acted as jurors had made affirmation instead of oath, but it may be stated that they served as jurymen in the same manner as if no Act had passed for enabling persons to serve as jurymen without oath.

XV. And be it further enacted, That if any witness shall be objected to as incompetent on the ground that the verdict or judgment in the action on which it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action in favor of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or

judgment against the party on whose behalf he shall have been examined, be admissible in evidence against him or any one claiming under him.

XVI. And be it further enacted, That the name of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall, at the trial, be endorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the Court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceedings in which the verdict or judgment shall be offered in evidence.

XVII. And be it further enacted, That in every action brought by any executor or administrator, in right of the testator or intestate, such executor or administrator shall, unless the Court in which such action is brought, or a Judge of any such Court, shall otherwise order, be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner.

XVIII. And be it further enacted, That where several persons shall be made defendants in any personal action, and any one or more of them shall have a nolle prosequi entered as to him or them, or upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless in the case of a trial the judge before whom such case shall be tried, shall certify upon the record under his hand that there was a reasonable cause for making such person a defendant in such action.

XIX. And be it further enacted, That in all writs of scire facias the plaintiff obtaining judgment on an award of execution shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined; and that where judgment shall be given either for or against a plaintiff, or for or against a defendant, upon any demurrer joined in any action whatever, the party in whose favor such judgment shall be given shall also have judgment to recover his costs in that behalf.

XX. And be it further enacted, That it shall be lawful for the executors or administrators of any lessor or landlord to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime.

XXI. And be it further enacted, That such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined: Provided, that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; Provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent, shall be applicable to the distresses so made as aforesaid.

XXII. And whereas it is expedient to render references to arbitration more effectual; be it further enacted, that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of Court or Judge's order, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of Her Majesty's Courts of Record in this Island, shall not be revocable by any party to such reference without the leave of the Court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a Judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award although the person making such revocation shall not afterwards attend the reference, and that the Court, or any Judge thereof, may from time to time enlarge the term for any such arbitrator making his award.

XXIII. And be it further enacted, That when any reference shall have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any Judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned, in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of Court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire before whom the attendance is required, shall also be served either together-with or after the service of such rule or order: Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment of expenses and for loss of time, as for and upon attendance at any trial: Provided also, that the application made to such Court or Judge for such rule or order shall set forth the town or place where such witness is residing at the time, or satisfy such Court or Judge that such person cannot be found: Provided so that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days to be named in such order.

XXIV. And be it further enacted, That when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of Court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrators or umpire, or any one arbitrator, and he or they are hereby authorised and required to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if, upon such oath or affirmation, any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.

XXV. And whereas great delay and inconvenience, or a failure of justice, is sometimes occasioned by reason of the absence from the colony of the defendant, or defendants, or some one or more of the defendants, in actions at law and suits in equity commenced by any process other than process of attachment: For remedy thereof be further enacted, That in all actions at law or suits in equity which may hereafter be brought or commenced, and wherein the plaintiff shall proceed by any process other

than process of attachment, and a copy of the writ or other process, with a notice of the intent and meaning of the service of such writ or process, and (in actions at law commenced by writ of summons) a copy of the plaintiff's declaration, shall be duly served upon the known agent of any absent defendant or defendants, or upon, such one or more of the defendants in any such action or suit, being a partner or partners of such absent defendant or defendants as shall be within this colony, and a copy of the writ or other process, with an affidavit of the service thereof, and (in actions at law commenced by writ of summons as aforesaid) the original declaration, shall have been duly returned and filed, it shall be lawful for the plaintiff to enter an appearance for such absent, defendant or defendants, and to proceed thereon in like manner as if such absent defendant or defendants had been personally served with such writ or other process.

XXVI. And be it further enacted, That in all actions or suits which may hereafter be commenced by any process other than process of attachment against two or more joint contractors or joint debtors, any one or more of whom shall be absent from or not resident in this colony, and shall not have any known agent as aforesaid, or shall not be the partner or partners of any defendant or defendants who shall be within this colony, the plaintiff or plaintiffs may file his or their declaration against such of the said joint debtors or joint contractors as have been duly served with process, and may suggest in such declaration that the other joint debtor or debtors or joint contractor or contractors (naming him or them) was or were absent from the colony, and without the jurisdiction of the Court, at the time of issuing the process and at the time of filing such declaration; and thereupon the plaintiff or plaintiffs may proceed according to the usual practice of the Court, to obtain judgment against the defendant or defendants who shall have been so duly served with process; and it shall be lawful for the plaintiff or plaintiffs, after judgment recovered as aforesaid, to take out execution thereon, and to cause the same to be levied on the joint property, if any, of such joint debtors or joint contractors, or upon the body, or the lands, goods, debts or effects of the defendant or defendants against whom judgment shall have been recovered as aforesaid : Provided always, that final judgment shall not in any such case be signed against any such joint debtor or joint contractor, until the plaintiff or plaintiffs shall make it appear to the satisfaction of the Court that all reasonable means have been taken to discover the place of residence of any such absent joint contractor or contractors or joint debtor or debtors, and to apprise him, her, or them, of such action or suit having been so instituted as aforesaid, or that such absent joint contractor or contractors or joint debtor or debtors have been apprized of the institution of such action or suit, and the said Court shall be of opinion that he, she, or they, could reasonably have appeared thereto.

XXVII. And be it further enacted, That if any such joint debtor or joint contractor, being absent as aforesaid, and not served with mesne process, shall come into the colony, and within the jurisdiction of the Court, before the final determination of the action or suit against the other joint contractor or contractors, joint debtor or debtors, and shall apply to the Court, or a Judge thereof, to be admitted to appear to defend the said action, the Court or Judge shall admit him accordingly, and shall cause such amendment to be made in the proceedings as may in such case be necessary.

XXVIII. And be it further enacted, That if any such absent joint contractor or joint debtor shall come into the Colony after final judgment given in any such cause, it shall be lawful for the plaintiff or plaintiffs, in case he or they shall not have received full satisfaction on such judgment, to sue out a writ

of scire facias against such last mentioned joint contractor or joint debtor, requiring him to appear and show cause why execution should not be had against him, his lands, goods, debts, or effects, to satisfy the said judgment or whatever may remain due thereon; and such defendant shall be allowed to plead either in bar to the original action or suit, or in answer to the said scire facias, and thereupon the Court shall proceed to try and determine the same, and to give judgment as in other causes instituted by such writ.

XXIX. Provided always, and be it further enacted, That nothing herein contained shall be construed to affect or prevent any proceedings instituted, or which may be instituted, against any absent or absconding debtors, pursuant to the Acts in such case made and provided.

XXX. And whereas it is expedient to afford a summary jurisdiction in cases not exceeding ten pounds sterling, in the superior Courts of Record in this colony: be it therefore enacted, that in all cases arising ex contractu, where the amount sought to be recovered shall not exceed ten pounds sterling, it shall and may be lawful for the judges of the said Courts respectively, to hear and determine all such cases in a summary manner; and that in such cases it shall not be necessary to file any issue or default roll or enter up any postea or judgment, but that such cases shall proceed upon the original writ, (which shall contain a brief statement of the cause of action), and other proceedings as filed in Court, when the parties shall be at issue; and that a memorandum of the judgment of the said Courts respectively shall be entered in the record books of the proceedings of the same: Provided that in all cases to or exceeding five pounds sterling it shall be lawful for the plaintiff or defendant to require a jury for the trial of such cause: Provided that such trial by a jury shall be upon the original writ, and other pleadings in manner hereinbefore provided: Provided also, that no costs for such jury shall be taxed, unless the judge, who tried the cause shall certify under his hand, on the back of the writ, that there was reasonable cause for praying such jury.