

Laws of Her Majesty's Province of Newfoundland, passed in the year 1864. J. C. Withers,
Queen's Printer, 1864.

27 Victoria – Chapter 11

An Act to amend and consolidate the Statute Law of Evidence. (Passed 13th April, 1864.)

Whereas it is expedient to amend and consolidate the Statute Law of Evidence.

Be it therefore enacted, by the Governor, Legislative Council, and Assembly, in Legislative Session convened, as follows:—

I. It shall be lawful for the Supreme Court and each of the Circuit Courts of this Colony, and the Court of Labrador, and for the several Judges thereof, in every action depending in the said Courts, upon the application of any party to the suit, and at any stage thereof, to order the examination on oath, upon interrogatories or otherwise, before an examiner, to be named for that purpose, of any witness within the jurisdiction of the Court where the action shall be pending, or to order a commission to issue for the examination of witnesses on oath at any place out of such jurisdiction, by interrogatories or otherwise; and by the same or any subsequent order or orders, to give all such directions touching the time, place, and manner of such examinations, as well within the jurisdiction of the Court wherein the action shall be depending, as without, and all other matters and circumstances connected with such examinations as may appear reasonable and just.

II. When any rule or order shall be made for the examination of witnesses within the jurisdiction of the Court wherein the action shall be depending, by authority of this Act, it shall be lawful for the Court or any Judge thereof, in and by the first rule or order to be made in the matter, or any subsequent rule or order, to command the attendance of any person to be named in such rule or order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such rule or order, and to direct the attendance of any such person to be at his own place of abode or elsewhere, if necessary or convenient so to do; and the wilful disobedience of any such rule or order shall be deemed a contempt of Court, and proceedings may be thereupon: immediately had by attachment, by order of the Court or a Judge, if, in addition to the service of the rule or order, an appointment of the time and place of attendance, in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served 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, for expenses and loss of time, as upon attendance at a trial; Provided also, 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 of the cause.

III. It shall be lawful for any Sheriff, Gaoler, or other officer having the custody of any prisoner, to take such prisoner for examination under the authority of this Act, by virtue of a rule or order of the Court or a Judge, either contained in the rule or order for the examination of such prisoner, or made separately therefrom.

IV. The costs of every rule or order to be made for the examination of witnesses under any commission or otherwise, by virtue of this Act, and of the proceedings thereupon, shall be costs in the cause, unless otherwise directed, either by the Judge making such rule or order, or by the Judge before whom the cause may be tried, or by the Court

V. No examination or deposition, to be taken by virtue of this Act, shall be read in evidence at any trial without the consent of the party against whom the same may be offered, unless it shall appear to the satisfaction of the Judge that the examinant or deponent is beyond the jurisdiction of the Court, or dead, or unable, from permanent sickness or other permanent infirmity, to attend the trial; in all or any of which cases the examinations and depositions, certified under the hand of the commissioner, examiner, or other person taking the same, shall and may, without proof of the signature to such certificate, be received and read in evidence, saving all just exceptions.

VI. For the purposes of this Act a witness shall be deemed to be beyond or proceeding beyond the jurisdiction of the Court when he shall be out of or about to proceed out of the electoral district in which the Court shall then be holden.

VII. On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding, in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action or other proceeding may be brought or defended, of who may have any interest in the result thereof, and the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit, action, or other proceeding, may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding; Provided that the party so called to testify may be cross-examined by the opposite party under the rules applicable to the cross-examination of witnesses.

VIII. Nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offense, or any offense punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding, or in any proceeding instituted in consequence of adultery, render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband; nor shall, anything, in this Act contained affect the Laws now in force relating to the estates of idiots or lunatics, or the execution or attestation of last Wills and Testaments. Provided that nothing herein contained shall preclude a defendant from becoming a witness, should he think fit, in any summary proceeding for assault and battery, or upon any charge under the Act 4 Will. 4, Cap 7, entitled "An Act to provide for the maintenance of Bastard Children."

IX. No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.

X. Nothing herein contained shall apply to any action, suit, proceeding or bill, in any Court of common law, or in any Ecclesiastical Court, instituted in consequence of adultery, or to any action for breach of promise of marriage.

XI. A clergyman or priest shall not be compellable to give evidence as to any confession made to him in his professional character.

XII. All proclamations, treaties, and other acts of state of any Foreign State or of any British Colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in Great Britain or Ireland, or in any Foreign State, or in any British Colony, and all affidavits, pleadings and other legal documents, filed or deposited in any such Court, may be proved in any Court of Justice, or before any person having, by law or by consent of parties, authority to hear, receive, and examine evidence either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy, to be admissible in evidence, must purport to be sealed with the seal of the Foreign State or British Colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any British, Foreign or Colonial Court, or any affidavit, pleading, or other legal document, filed or deposited in any such Court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the British, Foreign or Colonial Court to which the said original document belongs, or, in the event of such Court having no seal, to be signed by the Judge, or, if there be more than one Judge, by any one of the Judges of the said Court; and such Judge shall attach to his signature a statement in writing, on the said copy, that the Court whereof he is Judge has no seal; but if any of the aforesaid authenticated; copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

XIII. Every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any British Court of Justice, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes, in any Court of Justice in this Colony, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

XIV. Every register of a vessel, kept under any of the Acts relating to the registry of British vessels, may be proved in any Court of Justice, or before any person having, by law or by consent of parties,

authority, to hear, receive, and examine evidence, either by the production of the original or by an examined copy thereof, or by a copy thereof purporting to be certified under, the hand of the person having the charge of the original; and which person is hereby required to furnish such certified copy to any person applying, at a reasonable time, for the same, upon the payment of the sum of twenty-five cents; and every such register, or such copy of a register, and also every certificate of registry granted under any of the Acts relating to the registry of British vessels, and purporting to be signed as required by law, shall be received in evidence in any Court of Justice, or before any person having, by law or by consent of parties, authority to hear, receive and examine evidence, as prima facie proof of all matters contained or recited in such register, when the register or such copy thereof as aforesaid is produced, and of all matters contained or recited in, or endorsed on, such certificate of registry when the said certificate is produced.

XV. Whenever any book, or other document, is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents proveable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence in any Court of Justice, or before any person now or hereafter having, by law or consent of parties, authority to hear, receive, and examine evidence; Provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified, as a, true copy or extract, by the officer, to whose custody the original is entrusted; and which, officer is hereby required to furnish such certified copy or extract to any person ,applying, at a reasonable time, for the same, upon payment of a reasonable sum for the same, not exceeding ten cents for every folio of ninety words.

XVI. If any officer or other person, authorized or required by this Act to furnish any certified copies or extracts, shall wilfully certify any document as being a true copy or extract, knowing that the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanor, and be liable, upon conviction, to imprisonment for any term not exceeding eighteen months.

XVII. Every Court, Judge, Justice, Officer, Commissioner, Arbitrator, or other person, now or hereafter having, by law or by consent of parties, authority to hear, receive, and examine, evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively.

XVIII. If any person shall forge the seal, stamp, or signature of any document in this Act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit he shall be guilty of felony, and shall, upon conviction, be liable to banishment for seven years, or to imprisonment for any term not exceeding three years, nor less than one year, with hard labor; and when any such document shall have been admitted in evidence by virtue of this Act, the Court or the person, who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that, the same shall be impounded and kept in the custody of some officer of the Court, or other proper person, for such period and subject to such conditions as to the said Court or other proper person shall seem meet; and every accessory before or after the fact to any such offense, may be dealt with, indicted, tried, and, if convicted, sentenced, and his offense laid and charged to have been committed in any district or place in which the principal offender may be tried.

XIX. That from and after the passing of this Act no person offered as a witness shall be excluded, by reason of incapacity from crime, from giving evidence according to the provisions of this Act or otherwise; and any person present in Court, or before a Judicial Officer, may be required to testify in the same manner as if he were in attendance upon subpoena issued by such Court or Officer.

XX. When any deposition examination, or evidence, under commission or by consent of parties or otherwise, has been once taken, it may be read in any stage of the same action, suit, or proceeding, or in any other action, suit, or proceeding, between the same parties or the representatives of any of them, or any person claiming right or title under them (for the, same cause of action), subject to all just exceptions; Provided the witness giving the evidence be dead, insane, beyond the jurisdiction of the Court, or be kept away by contrivance.

XXI. For the purpose of perpetuating the testimony of Witnesses, the applicant must produce to one of the superior Courts of this Island, or a Judge thereof, an affidavit stating such facts and circumstances as are usual and necessary to support a bill for perpetuating testimony; whereupon the Court or Judge shall grant a rule or order nisi for the examination of the witness or witnesses; and upon the appearance of the adverse party, and no sufficient cause shewn to the contrary, or upon proof of the service of the rule or order on such party, his agent or attorney, the Court or Judge shall make such rule or order absolute for such examination, subject to such terms or conditions, as to costs or otherwise as they or he may deem expedient to prescribe.

XXII. If a trial be had between the parties named in the affidavit as parties actual or expectant, or their successors in interest, upon proof of the death, insanity, or absence from the jurisdiction, of the witness, the examination or a certified copy thereof may be given in evidence by either party on the trial, subject to all just exceptions.

XXIII. The examination, when taken and completed, must be subscribed by the witness, then certified by the examiner, and filed in the office of the Clerk of the Court from which the original order shall issue, together with the said order and affidavit of service. The mode of examination of the witness shall be viva voce, except in case the witness, who is sought to be examined, reside at such a distance from the place of application as to render it necessary or advisable that he should be examined upon interrogatories, to accompany the order directing the examination. If the adverse party should fail in attending at the examination, or in examining the witness, or in furnishing his cross interrogatories, within the time prescribed in the order, or such further time as the Court or Judge may allow, the applicant may proceed with such examination or examinations ex parte.

XXIV. Either party may call on the other party, by notice, to admit any documents, saying all just exceptions; and in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial the Judge shall certify that the refusal to admit was reasonable; and no costs of proving any documents shall be allowed unless such notice be given, except in cases where the omission to give, the notice is, in the opinion of the master, a saving of expense.

XXV. An affidavit of the attorney in the cause, or his clerk, of the due signature of any admissions made in pursuance of such notice, and annexed to the affidavit, shall be in all cases sufficient evidence of such admissions.

XXVI. An affidavit of the attorney in the cause, or his clerk, of the service of any notice to produce, in respect to which notice, to admit shall have been given, and of the time when, it was served with a copy of such notice to produce, annexed to such affidavit, shall be sufficient evidence of the service of the original, of such notice, and of the time when it was served.

XXVII. If any person called as a witness, or required or desiring to make an affidavit or deposition, shall refuse, or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the Court or Judge, or other presiding officer, or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation of declaration, in the words followings — videlicet:

I, A. B., do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful, and I do also solemnly, sincerely, and truly affirm and declare, &c. Which solemn, affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form.

XXVIII. If any person making such solemn affirmation or declaration shall wilfully, falsely, and maliciously affirm or declare any matter or thing, which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this colony are or may be enacted or provided against persons convicted of wilful and corrupt perjury.

XXIX. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the Judge, prove adverse, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

XXX. If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion must be mentioned to the witness and he must be asked whether or not he has made such statement.

XXXI. A Witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it be intended to contradict such witness by the writing his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; Provided always, that it shall be competent for the Judge, at any time during the

trial, to retire the production of the writing for his inspection and he may thereupon make such use of it for the purposes of the trial, as he shall think fit.

XXXII. A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanor, and upon being so questioned if he either deny the fact or refuse to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction of such offense, purporting to be signed by the Clerk of the Court where the offender was convicted, or by the deputy of such clerk or officer, (for which certificate a fee of one dollar and no more, shall be demanded of taken) , shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have made the same.

XXXIII. It shall not be necessary to prove the attesting witness any instrument the validity of which attestation is not requisite; and such instrument may be proved by admission, or otherwise, as if there had been no attesting witness thereto.

XXXIV. Comparison of a disputed writing with any writing proved, to the satisfaction of the Judge, to be genuine, shall be permitted to be made by witnesses, and the evidence of witnesses respecting the same may be submitted to the Court and Jury as evidence of the genuineness or otherwise of the writing in dispute.

XXXV. Upon the hearing of any motion or summons, it shall be lawful for the Court or Judge, at their or his discretion, and upon such terms, as they or he shall think reasonable, from time to time to order such documents as they or he may think fit to be produced, and such witnesses as they or he , may think necessary to appear, and be examined viva voce, either before such Court or Judge, or before the Master, and upon hearing such evidence or reading, the report of such Master, to make such rule or order as may be just.

XXXVI. The Court or Judge may, by such rule or order, or by any subsequent rule or order, command the attendance of the witnesses named therein, for the purpose of being examined, or the productions of any writings or other documents to be mentioned in such rule or order, and such rule or order shall be proceeded upon in the same manner, and shall have the same force and effect, as a rule of the Court under the second section of this Act; and it shall be lawful for the Court or Judge or Master to adjourn the examination from time to time, as occasion may require; and the proceedings upon such examination shall be concluded, and the depositions taken down, in the mode now in use with respect to the viva voce examination of witnesses.

XXXVII. Any party to any civil action, or other civil proceeding, in any of the superior Courts, requiring the affidavit of a person who refuses to make an affidavit, may apply, by summons, for an order to such person to appear and be examined upon oath before a Judge or Master, to whom it may be most convenient to refer such examination, as to the matters concerning which he has refused to make an affidavit; and the Judge may, if he think fit, make such order for the attendance of such person before the person therein appointed to take such examination, for the purpose of being examined as aforesaid, and for the production of any writings or documents to be mentioned in such order, and

may therein impose such terms, as to such examination and the costs of the application and proceedings thereon, as he shall think just.

XXXIII. Such order shall be proceeded upon in like manner as an order made under the second section of this Act, and the examination thereon shall be conducted, and the depositions taken down and returned, as nearly as may be in the mode now used oh viva voce examinations.

XXXIX. Upon the application of either party to any cause or other civil proceeding in any of the superior Courts, upon an affidavit by such party of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or Judge to order that the party against whom such application is made, or, if such party is a body corporate, that some officer to be named of such body corporate shall answer on affidavit, stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody they or any of them are in, and whether he or they object; and if so, on what grounds, to the production of such as are in his or their possession or power, and upon such affidavit being made, the Court or Judge may make such further order thereon as shall be just.

XL. In all causes in any of the superior Courts, by order of the Court or a Judge, the plaintiff may with the declaration, and the defendant may with the plea, or either of them by leave of the Court or a Judge may, at any other time, deliver to the opposite party or his attorney, (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such matter,) interrogatories, in writing, upon any matter as to which discovery may be sought, and require such party, or, in case of a body corporate, any of the officers of such body corporate, within ten days, to answer the questions in writing by affidavit to be sworn and filed in the ordinary way; and any party or officer omitting, without just cause, sufficiently to answer all questions as to which a discovery may be sought, within the above time, or such extended time as the Court or a Judge shall allow, shall be deemed to have committed a contempt of the Court, and shall be liable to be proceeded against accordingly.

XLI. The application for such order shall be made upon an affidavit of the party proposing to interrogate, and his attorney or agent, or, in the case of a body corporate, of their attorney or agent, stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether plaintiff or defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or defense upon the merits, and, if the application be made on the part of the defendant, that the discovery is not sought for the purpose of delay; Provided that where it shall happen, from unavoidable circumstances, that the plaintiff or defendant cannot join in such affidavit, the Court or Judge may, if they or he think fit, upon affidavit of such circumstances by which the party, is prevented from so joining therein, allow and order that the interrogatories may be delivered without such affidavit.

XLII. In case of omission, without just cause, to answer sufficiently such written interrogatories, it shall be lawful for the Court or a Judge, at their or his discretion, to direct an oral examination of the interrogated party, as to such points as they or he may direct, before a Judge or Master, or Examiner;

and the Court or Judge may, by such rule or order, or any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination, for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination and the costs of the application and of the proceedings thereon, and otherwise, as to such Court or Judge shall seem just.

XLIII. Such rule or order shall have the same force and effect, and may be proceeded upon in like manner, as an order made under the second section of this Act.

XLIV. Whenever, by virtue of this Act, an examination of any witness or witnesses has been taken before a Judge of one of the said superior Courts, or before a Master or Examiner, the depositions taken down by such person shall be returned to and kept in the Clerk's Office of the Court in which, the proceedings are pending; and office copies of such depositions may be given put, and the depositions may be otherwise used, as the Court or Judge may direct.

XLV. It shall be lawful for every Judge, Master, or Examiner, named in any such rule or order as aforesaid, for taking examinations under this Act, and he is hereby required, to make, if need be, a special report to the Court in which such proceedings are pending, touching such, examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the Court is hereby authorized to institute such proceedings and make such order and orders upon such report, as justice may require and as may be instituted and made in any case of contempt of the Court.

XLVI. The costs of every application for any rule or order to be made for the examination of witnesses by virtue of this Act, and of the rule or order and all proceedings thereunder, shall be in the discretion of the Court or Judge by whom such rule or order is made.

XLVII. Where a deed of document shall have been duly registered in pursuance of the laws of this Colony, and the same shall, on the trial of any cause, suit, or proceeding, be proved to be lost, such registry, or a certified copy thereof by the Registrar, shall, without further proof, be admitted in evidence in all cases where the original, if produced, would be receivable.

XLVIII. An Act passed in the nineteenth year of the reign of Her present Majesty, entitled "An Act to amend the Law of Evidence," shall be and the same is hereby repealed; Provided always that nothing herein contained shall be construed to revive any Acts or parts of Acts by the said recited Act repealed.

XLIX. The sixth and eighth sections of an Act passed in the twelfth year of the reign, of Her present Majesty, entitled "An Act for the further amendment of the Law and the better advancement of Justice;" shall be and the same are hereby repealed.