

Laws of His Majesty's Province of Upper-Canada; Passed in the Fourth Session of the Provincial Parliament of Upper Canada, Met at Newark, on the Sixth Day of July, in the Thirty-Fifth Year of the Reign of our Sovereign Lord George the Third (1795). Niagara: Gideon Tiffany, Printer to the King's Most Excellent Majesty, 1795.

35 George III – Chapter 2

An Act to establish a Superior Court of Civil and Criminal Jurisdiction, and to regulate the Court of Appeal.

For the general and regular administration of justice throughout this province; Be it enacted by the king's most excellent majesty, by and with the advice and consent of the legislative council and assembly of the province of Upper-Canada constituted and assembled by virtue of and under the authority of an Act passed in the parliament of Great-Britain, entitled, an Act to repeal certain parts of an Act passed in the fourteenth year of his majesty's reign, entitled, "An Act for making more effectual provision for the government of the province of Quebec, in North America, and to make further provision for the government of the said province," and by the authority of the same, That there be constituted and established, and there is hereby constituted and established a court of law, to be called and known by the name and style of his majesty's court of King's Bench, for the province of Upper-Canada, which shall be a court of record of original jurisdiction, and shall possess all such powers and authorities as by the law of England are incident to a superior court of civil and criminal jurisdiction, and may and shall hold plea in all, and all manner of actions, causes or suits, as well criminal as civil, real, personal and mixed, arising, happening or being within the said province, and may and shall proceed in such actions, causes or suits by such process and course, as shall tend with justice and dispatch, to determine the same, and may, and shall hear and determine all issues of law, and shall also hear, and by and with an inquest of good and lawful men determine all issues of fact that may be joined in such action, cause or suit, as aforesaid, and judgment thereon give, and execution thereof award, in as full and ample a manner as can or may be done in his majesty's courts of king's bench, common bench, or in matters which regard the king's revenue by the court of exchequer in England. And that his majesty's chief justice of this province, together with two puisne justices shall preside in the said court, which court shall be holden in a place certain, that is in the city, town, or place where the governor or lieutenant-governor shall usually reside; and until such place be fixed, the said court shall be holden at the last place of meeting of the legislative council and assembly.

II. And in order that certain stated times be fixed for the sitting of the court, be it enacted by the authority aforesaid, That four periods of session or terms be appointed in each year, successively, to be known by the names of Hilary, Easter, Trinity and Michaelmas term. That the Hilary do commence on the third Monday in January, and end on the Saturday of the ensuing week. That Easter term do commence on Monday next after the sixteenth day of April, and end on the Saturday of the ensuing week. That the Trinity term do commence on the third Monday in July, and end on the Saturday of the ensuing week: and that the

Michaelmas term do commence on the first Monday in October, and end on the Saturday next ensuing: and that the first and last days of every term, and every alternate day from the first, not including Sunday, be return days.

III. Provided always, and be it hereby further enacted, That when the court shall have good reason to believe there will not be sufficient business to require their daily attendance throughout the term, they may be at liberty to adjourn the court on any return day, to the next immediate return day.

IV. And be it further enacted by the authority aforesaid, That all writs to be sued out of the said court shall issue in the king's name and be tested by the chief justice or in his absence, by the senior judge of the court, and be returnable on some return day in term time, and that not less than fifteen days inclusive, shall always intervene between the teste and return of the first process that shall be directed to the sheriff of the Home district, or the district in which the court shall be holden, and that not less than forty days inclusive shall always intervene between the teste and return of the first process into every other district.

V. And be it further enacted by the authority aforesaid, That the original and first process of the said court shall be by writ of *capias ad respondendum*; and in order that the defendant or defendants may be immediately apprized of the cause of complaint against him or them, the said writ shall state the form of Action, and refer to the declaration which shall always be annexed to, and served with the writ; and for that purpose it is hereby further enacted, That no process shall issue at the suit of any plaintiff, where the defendant is not to be holden to special bail, until the declaration on which it may be founded shall be filed in the office.

VI. And be it further enacted by the authority aforesaid, That no person shall be arrested or holden to special bail, upon any process issuing out of the said court in a civil suit, unless an affidavit be first made by the plaintiff, that the defendant is justly and truly indebted to him, in a sum certain, which, together with the account for which it became due, shall be specified, and also that the deponent verily believes the defendant is about to leave the province, with an intent to defraud his creditors, which affidavit may be made before any judge or commissioner of the court, authorized to take affidavits as herein after is provided, or else before the officer who shall issue such process, or his deputy, which oath the said officer or his deputy are hereby authorized to administer; and for such affidavit one shilling shall be paid and no more; and the sum or sums specified in such affidavit, shall be endorsed on the back of the writ, or process, for which sum or sums the sheriff or other officer to whom such writ or process shall be directed shall take bail, and for no more.

VII. And whereas by reason of the present want of a certain and ready communication throughout the province, it may be practicable for fraudulent persons to escape from their creditors, before process can be obtained from the said court to prevent them, be it further enacted by the authority aforesaid, That it shall and may be lawful for any plaintiff having made such affidavit as aforesaid, to sue out from the clerk of the peace, in each and every

district, a writ of *capias ad respondendum*, with which the said clerk shall, from time to time be supplied, signed by the proper officer of the court, on which shall be endorsed the amount of the sum sworn to, and to which the said affidavit shall be annexed; whereupon it shall and may be lawful for the sheriff to arrest the said defendant and hold him to special bail, to the amount of the sum endorsed.

VIII. And be it further enacted by the authority aforesaid, That in all civil suits where the defendant shall not be holden to bail, by reason of such affidavit as aforesaid, the ordinary course of proceeding shall be by serving or causing the defendant or defendants personally to be served with a copy of the process and declaration, by some literate person; and if such defendant or defendants shall not appear at the return of the process, or within eight days after such return, in such case it shall and may be lawful for the plaintiff or plaintiffs upon affidavit being made and filed of the personal service of such process and declaration, which affidavit shall be filed gratis, to enter a common appearance for the defendant or defendants, and to proceed thereon, as if such defendant or defendants had entered his, her or their appearance.

IX. And be it further enacted by the authority aforesaid, That upon every copy of such process, to be served upon any defendant, shall be written a notice in the English tongue, to such defendant, of the intent and meaning of first service to the effect following:

“A. B. You are served with this process, to the intent that you may, either in person or by your attorney, appear in his majesty’s court of king’s bench, at the return thereof, being the _____ day of _____ in order to your defence in this Action.”

And when any party, defendant, is a Canadian subject by treaty, or the son or daughter of such Canadian subject, the like notice shall be written in the French language.

“A. B. Il vous est enjoint et ordonné de comparoitre personnellement ou par procureur a la cour du banc du roy a l’expiration de ce writ qui sera le _____ jour _____ pour repondre a cette action.”

X. And be it further enacted by the authority aforesaid, That it shall and may be lawful for each and every defendant personally to attend and enter his, her or their appearance at the office, on or before the day at which the process or writ shall be returnable, or to authorize any person to enter an appearance for him, her or them: and that in all actions or suits where the defendant or defendants have entered, or caused such appearance to be entered, the plaintiff or his attorney shall, by a demand in writing, call for a plea; and in all actions or suits where the defendant or defendants live within the Home district, or the district in which the court shall be holden, four days shall be allowed after such demand, as the ordinary time within which they shall be required to file their plea to the action; and in all actions or suits where the defendant or defendants reside without the limits of the Home district or district where the court shall be holden, eight days shall be allowed after such demand, as the ordinary time within which they shall be required to file their plea, and if

after the expiration of such times respectively, no plea be filed, it shall and may be lawful for the plaintiff or plaintiffs or his attorney to sign judgment in the cause.

XI. And be it further enacted by the authority aforesaid, That in all actions or suits, where the defendant or defendants, having been served with a copy of process, with such written notice as aforesaid, shall neglect to enter their appearance at the return of the writ, it shall and may be lawful for the plaintiff or plaintiffs, having entered such appearance for the said defendant or defendants, as aforesaid, at the expiration of eight days after having entered such appearance, to sign judgment in the cause, without any demand of a plea.

XII. And be it further enacted by the authority aforesaid, That the first and last day of all periods of time limited by this act, or hereafter to be limited by any rules or orders of court, for the regulation of practice, be inclusive.

XIII. And be it further enacted by the authority aforesaid, That the form of proceeding in the said court shall be by a course of pleading, to issue in the most compendious manner; and that in actions founded on a common undertaking, the following form of declaration may be adopted.

A. B. complains of C. D. late of _____ For that whereas the said C. D. on the day of _____ at was indebted to the said A. B. in the sum of _____ (the consideration advanced) and being so indebted, he the said C. D. then and there undertook and faithfully promised the said A. B. to pay him the said sum, when he the said C. D. should be requested, and though since requested doth now refuse so to do to the said A. B. his damage of £. _____ who therefore brings his suit.

XIV. And be it further enacted by the authority aforesaid, That each and every of the statutes of jeofails, and each and every of the statutes of limitations, and each and every of the statutes for the amendment of the law, excepting those of mere local expediency, which from time to time have been provided and enacted, respecting the law of England, be adopted and declared to be Valid and effectual for the same purposes in this province.

XV. And in order to discourage vexatious suits, and to prevent additional charges upon any defendant or defendants who may be willing to pay the sum which he or they admit to be justly due, Be it enacted that in all cases where the sum demanded by any plaintiff or plaintiffs is a sum certain, or is capable of being ascertained by computation of numbers, it shall and may be lawful for any defendant or defendants, to move that he or they may be at liberty to pay into court such sum as he or they shall propose to pay in full discharge of the said demand; whereupon the court may order a rule to be drawn up to such effect, or in time of vacation, such order may be made by a judge of the court, and in case the plaintiff shall be willing to accept, and shall accept the same, together with all costs accruing to that time, to be taxed by the proper officer, the same shall be in full satisfaction of such his demand, and all further proceedings in the said action shall cease; and to the end that every plaintiff or his attorney may know of such proceeding, the defendant or defendants shall,

and are hereby required to serve a copy of the rule authorizing such payment to be made, upon the plaintiff or his attorney, at the time of filing his plea of the general issue, to such plaintiffs declaration.

XVI. Provided always, That upon payment of money into court, it shall and may be lawful for the officer receiving the same, to demand, and take a sum not exceeding twenty shillings, for every hundred pounds so paid into court, and at, and after the same rate and proportion, for every sum of money so paid, and also to demand and take the sum of one shilling for every receipt by him given on account of money so paid in as aforesaid.

XVII. And for the more convenient administration of justice throughout the province, Be it enacted, That it shall and may be lawful for the governor, lieutenant-governor or person administering the government of this province, to issue yearly and every year, in the vacation between the Trinity and Michaelmas terms, such commissions of assize and *nisi prius*, into the several districts, as may be necessary for the purpose of trying all issues joined in the said court, in any suit or action arising in the said districts respectively, and that when a suitable communication by land shall be opened from the city, town or place, which shall be the feat of government, into the respective districts, and the circumstances of the province may require it, it shall and may be lawful for the governor, lieutenant governor, or person administering the government, likewise to issue yearly and every year in the vacation between the Hilary and Easter terms, such commissions of assize and *nisi prius* into each of the several districts, as may be necessary for the trial of all issues joined in manner aforesaid; and to that end it shall and may be lawful for any person or persons upon reasonable notice given to the adverse party, or their attorney, to take and sue forth such writs and records of *nisi prius*, as maybe necessary for the trial of all issues joined in the said court as may be triable in the respective Districts of this province, and thereupon sue out their jury process in such manner and form, and with such awards as is practiced in the courts of *nisi prius* in England.

XVIII. Provided always, That nothing herein contained shall prevent or be construed to prevent the governor, lieutenant-governor or person administering the government of this province, from issuing a special commission or commissions for the trial of one or more offender or offenders upon extraordinary occasions when he shall deem it requisite or expedient that such commission should issue.

XIX. And be it further enacted by the authority aforesaid, That upon all issues joined in the said court in any suit or action which shall arise or be triable within the Home district, or in the district where the court shall be holden, the chief justice, or in his absence, any other judge of the said court, shall, as justice of *nisi prius* for the said district, at their discretion, either in term time, or within ten days next after the end of every Easter and Trinity term, respectively, try all manner of issues joined in the said court, which ought to be tried by an inquest of the said district, and that commissions and writs of *nisi prius* shall be for that purpose from time to time awarded; and it shall and may be lawful for any person or persons, upon reasonable notice as herein after set forth, given to the adverse party or their

attorney, to take and sue forth such writs and records of *nisi prius* as may be necessary for the trial of such issues as aforesaid.

XX. And be it further enacted by the authority aforesaid, That the sheriffs of the several districts shall, and they are hereby required to make return of all writs of *nisi prius* which shall be delivered to them, or their sufficient deputy, before the said chief justice, and every other judge who shall be assigned to execute such commissions of assize and *nisi prius*, and shall give their attendance upon the said chief justice, and each other justice, as well for the returning of such tales *de circumstantibus* as shall be prayed for the trial of such issues, as for the maintenance of good order in the king's court, and for the doing and executing of all other things to the office of sheriff in such case belonging and appertaining.

XXI. And be it further enacted by the authority aforesaid, That no indictment, information or cause whatsoever, shall be tried at *nisi prius*, before any judge or justice of assize or *nisi prius* or at the fittings of the Home district, or district where the said court shall be holden, unless notice of trial, in writing, has been given at lead eight days before such intended trial; and in case any party or parties shall have given such notice of trial as aforesaid, and shall not afterwards duly countermand the same, in writing, at least four days before such intended trial, every such party shall, upon neglect of bringing such issue to trial, be obliged to pay unto the party or parties to whom such notice of trial shall have been given, as aforesaid, the like costs and charges as if such trial had not been countermanded.

XXII. And be it further enacted by the authority aforesaid, That NO indictment, information or cause whatsoever, shall be tried at *nisi prius* before any judge or justice of assize or *nisi prius*, in any district, other than the Home district, or district where the court shall be holden, unless notice of trial has been given, at least twenty days before such intended trial; and in case any party or parties shall have given such notice of trial as aforesaid, and shall not afterwards countermand the same, in writing, at least fourteen days before such intended trial, every such party shall, upon neglect of bringing such issue to trial, be obliged to pay unto the party or parties to whom such notice of trial shall have been given as aforesaid, the like costs and charges as if such trial had not been countermanded.

XXIII. And whereas it may in many cases be desirable for the furtherance of justice to obtain the depositions of witnesses in civil suits, which cannot be had by the ordinary process of subpoena, Be it enacted by the authority aforesaid, That where the cause of action arises without the jurisdiction of the court, it shall and may be lawful on special application for that purpose made, to issue a commission under the seal of the court, to take the examination of witnesses residing without the limits of the province, due notice being given to the adverse party, to the end that he, she or they, may cause such witnesses to be cross examined, and also that when the testimony of any aged or infirm person, or of any person about to depart the province may be required, it shall and may be lawful for the said court to issue a commission, in like manner, for the examination of such aged or infirm person, or of any person about to depart the province, due notice being given to the adverse party for the purposes aforesaid.

XXIV. Provided always, and be it further enacted, That the examination of such aged or infirm person so taken, shall not be admitted or read at the trial of any issue, in case he or she be living at the time of the trial, and that the examination of such person about to depart the province, so taken, shall not be admitted or read at the trial of any issue, in case he or she shall be in the province at the time of such trial.

XXV. And be it further enacted by the authority aforesaid, That the allowance of costs to either party, plaintiff or defendant, in all civil suits and penal actions, be regulated by the statutes and usages which direct the payment of costs, by the laws of England.

XXVI. And be it further enacted, That the chief justice and other the justices of the said court of king's bench, for the time being, or any two of them, Whereof the chief justice for the time being to be one, shall, and may by one or more commission or commissions, under the seal of the said court, from time to time, as need shall require, empower what, and as many persons as they shall think fit and necessary, in all the several districts within this province, to take and receive all and every such affidavit and affidavits as any person or persons shall be willing and desirous to make before any of the persons so empowered, in or concerning any cause, matter or thing depending, or hereafter to be depending, or in any wife concerning any of the proceedings to be in the said respective courts, and that it shall and may be lawful for any judge of assize, in his circuit, to take and receive any affidavit or affidavits as any, person or persons shall be willing and desirous to make before him, in or concerning any cause, matter or thing depending or hereafter to be depending, or in any wife concerning any proceedings to be had in the said court of king's bench, which said affidavits, taken as aforesaid, shall be filed in the office of the said court, and there be read and made use of in the said court, to all intents and purposes as other affidavits, taken in the said courts ought to be, and that all and every affidavit and affidavits, taken as aforesaid, shall be of the same force as affidavits taken in the said court shall and maybe: and all and every person or persons forswearing him, her, or themselves, in such affidavit or affidavits, shall incur and be liable unto the same pains and penalties as if such affidavit or affidavits had been made and taken in open court.

Provided always, That for the taking of every such affidavit, the person or persons so empowered and taking the same, shall, for so doing, receive only the sum or fee of twelve pence and no more.

XXVII. And be it further enacted by the authority aforesaid, That the chief justice for the time being, and other the justices of the said court of kings bench, or any two of them, whereof the said chief justice shall be one, shall, or may by one or more commission or commissions, under the seal of the said court, from time to time, as need shall require, empower such and so many persons as they shall think fit and necessary, in all and every the several districts of this province, to take and receive all and every recognizance or recognizances of bail or bails, as any person or persons shall be willing or desirous to acknowledge, or make before any of the persons so empowered, in any action or suit

depending, or hereafter to be depending in the said court, in such manner and form, and by such recognizance or bail as the justices of the said court may hereafter take, or may think fit; which said recognizance or recognizances of half, or bail piece, so taken as aforesaid, shall be transmitted to any one of the justices of the said court, who upon affidavit made of the due taking of the recognizance of such half, or bail-piece, by some credible person, present at the taking thereof, such justice shall receive the same; which recognizance of bail, or half-piece, so taken and transmitted, shall be of the like effect as if the same were taken *de bene esse*, before any of the said justices; for the taking of which recognizance or recognizances of bail, or bail-piece, the person or persons so empowered, shall receive only the sum or fee of two shillings, and no more.

XXVIII. And be it further enacted, That the justices, respectively, shall make such rules and orders for the justifying of such bails, and making of the same absolute, as to them shall seem meet, so as the cognizor or cognizors of such bail or bails be not compelled to appear in person in the said court, to justify him or themselves; but the same may, and is hereby directed to be determined by affidavit or affidavits, duly taken before the said commissioners, who are hereby empowered and required to take the same, and also to be examined by the justices upon oath, touching the value of their respective estates.

XXIX. And be it further enacted, That any judge of assize, in his circuit, shall and may take and receive all and every such recognizance or recognizances of bail or bails, as any person shall be willing and desirous to make and acknowledge before him, which being transmitted in like manner as aforesaid, shall, without oath be received in manner as aforesaid.

XXX. And be it further enacted, That the several acts and ordinances of the governor and council, of the province of Quebec, whereby the several courts of common pleas in this province were constituted, and from time to time continued, be, and each and every of them are hereby repealed.

XXXI. And be it further enacted, That all proceedings upon actions, instituted and pending in any of the late courts of common pleas in this province, shall forthwith be transmitted into the court of king's bench, there to be continued to judgment and execution, as if the same had been commenced in the said court, for which purpose it shall and may be lawful for the governor, lieutenant-governor or person administering the government of this province, to issue a commission for the trial of all issues that may be joined in any of the said courts in their respective districts, and to direct that the records thereof be returned into the said court of king's bench.

XXXII. And be it further enacted, That all and singular the records of the several courts of common pleas for the Eastern district, for the Midland district, for the Home district, and for the Western district of this province, respectively, shall be transmitted to, and deposited in the said court of king's bench, and make a part of the records of the said court, for all such purposes as to law and justice may appertain.

XXXIII. And be it further enacted, That the governor, lieutenant-governor or person administering the government of this province, or the chief justice of the province, together with any two or more members of the executive council of the province, shall compose a court of appeal, for hearing and determining all appeals from such judgments or sentences as may lawfully be brought before them.

XXXIV. Provided always, and be it further enacted, That when any person having given the judgment or sentence appealed from, shall be a member of the court of appeal, it shall and may be lawful for him to assign to the said court his reasons for delivering such judgment, in case he shall be so disposed, but he shall not bear liberty to give his vote in the decision of the question, before the court.

XXXV. And be it further enacted, That an appeal shall lie to the court of the governor and executive council, from all judgments given in the said court of king's bench, in all cases where the matter in Controversy shall exceed the sum of one hundred pounds, or shall relate to the taking of any annual or other rent, customary or other duty, fee, or any other such like demand, of a general and public nature, affecting future rights, of what value or amount soever the same may be, upon proper security being given by the appellant that he will effectually prosecute his appeal and answer the condemnation, and also pay such costs and damages as shall be awarded in case the judgment or sentence appealed from shall be affirmed, and that upon the perfecting such security, execution shall be stayed in the original cause.

XXXVI. And be it further enacted by the authority aforesaid, That the judgment of the said court of appeal shall be final, in all cases where the matter in Controversy shall not exceed the sum or value of five hundred pounds sterling, but in cases exceeding that amount, as well as in all cases where the matter in question shall relate to the taking of any annual or other rent, customary or other duty, or fee, or any other such like demand of a general and public nature, effecting future rights, of what value or amount soever the same may be, an appeal may lie to his majesty, in his privy council, upon proper security being given by the appellant that he will effectually prosecute his appeal, and answer the condemnation, and also pay such costs and damages as shall be awarded by his majesty, in his privy council, in case the judgment of the said court of governor and executive council, or costs of appeals shall be affirmed: and upon the perfecting of such security, execution of the said judgment shall be stayed, until the final determination of such appeal to the king in council.

Provided always, and be it further enacted, That in time of actual war, and when there may be reason to suspect an invasion of the province from the king's enemies, it shall and may be lawful for the governor, lieutenant-governor, or person administering the government, by and with the advice and consent of the executive council, to issue his proclamation to remove the place of holding the said court, and to appoint and make known such other place, within the limits of the province, as shall be deemed most safe and convenient for holding the same.

XXXVII. And be it further enacted by the authority aforesaid, That it shall and may be lawful for the persons herein after mentioned, to demand and take the following fees, and no more, for the services respectively set forth.

XXXVIII. Provided always, That it shall and may be lawful for his majesty's attorney-general to demand and receive his fees in the increased proportion of one third, to the following table, to wit:

	£.	s.	d.		£.	s.	d.
Taking instructions to prosecute or defend, with warrant of attorney,	0	5	0	Notice of trial and all other notices	0	2	6
For drawing declaration,	0	5	0	Every subpoena,	0	1	0
Copy of the same,	0	2	6	Every motion of course,	0	5	0
Entering common appearance with clerk,	0	1	0	Every special motion,	0	7	6
Pleading general issue,	0	3	0	Preparing brief of facts,	0	10	0
Special plea, replication, or other plea,	0	10	0	Arguing demurer,	0	10	0
Copy of the same,	0	3	0	Fee with brief in matters under £30			
Drawing affidavit	0	5	0	10s. above			
				Every necessary attendance at the office, or on adverse party,	0	1	0
				Attending to strike special jury,	0	7	6
				Attending taxation of costs	0	5	0

Fees to be taken by the Clerk of the King's Bench in civil causes.

For entering appearance,	0	1	0	Drawing every postea and judgment,	0	10	4
For sealing, entering and filing every writ or precipe,	0	2	0	Writ of execution,	0	5	0
Drawing every order or rule of court,	0	2	0	Exemplifications and copies of all records, for each sheet containing 72 words,	0	1	0
Filing every declaration, plea, demurer or any pleading or paper,	0	2	0	Searching records for any one year,	0	1	0
Attending and striking special jury, with copies to each party	0	5	0	General search,	0	2	6
Every recognizance entered in court	0	5	0	Entering satisfaction on record,	0	2	6
				Writ of execution, possession, or restitution,	0	5	0

MARSHALL

Entry of every cause,	0	2	6	Entry of verdict,	0	2	6
Drawing the jury,	0	2	6				

CRIER

Calling and swearing each jury,	0	2	0	Calling any party on recognizance,	0	1	0
Calling plaintiff on nonsuit,	0	1	0				

SHERIFF

Serving a writ,	0	:	2	:	6	Bringing up prisoner by habeas					
Arrest,	0	:	5	:	0	corpus, in civil cause,	0	:	12	:	0
Bail bond,	0	:	5	:	0	Travelling per mile,	0	:	0	:	6
Poundage on execution,	0	:	0	:	6	Executing writ of enquiry,					
When for a sum exceeding £100,	0	:	0	:	3	summoning jury, and return of					
Service of writ of possession, or						inquisition,	0	:	10	:	0
restitution,	0	:	10	:	0	Attending view per diem,	0	:	15	:	0