

Laws of His Majesty's Province of Upper Canada, passed in the year 1837. Toronto: Robert Stanton, 1837.

7 William IV – Chapter 3

An Act for the further Amendment of the Law, and the better Advancement of Justice. Passed 4th March, 1837.

Whereas it would greatly contribute to the diminishing of expense in suits in the Court of King's Bench, if the pleadings therein were in some respects altered, and the questions to be tried by the Jury left less at large than they now are, according to the course and practice of pleading in several forms of action, but this cannot be conveniently done, otherwise than by rules or orders of the Judges of the said Court, from time to time to be made, and doubts may arise as to the power of the said Judges to make such alterations without the authority of the Legislature: Be it therefore 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 the Judges of His Majesty's Court of King's Bench in this Province, or the majority of them, including the Chief Justice, shall and may, by any rule or order to be from time to time by them made, in Term or Vacation, at any time within five years from the time when this Act shall take effect, make such alterations in the mode of pleading in the said Court, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs, and otherwise for carrying into effect the said alterations, as to them may seem expedient; and all such rules, orders or regulations, shall be laid before both Houses of the Legislature, if they shall be then sitting, immediately upon the making of the same, or if the Legislature be not then sitting, then within five days after the next meeting thereof; and no such rule, order or regulation, shall have effect until six weeks after the same shall have been so laid before both Houses of the Legislature; and any rule or order so made, shall, from and after such time aforesaid, be binding and obligatory on the said Court, and all other Courts of Common Law in this Province, to which the same shall be made expressly to extend, and on all Courts of Appeal or Courts of Error in this Province, into which the Judgments of the said Courts, or any of them, shall be carried by Appeal or by any Writ of Error, and be of the like force and effect as if the provisions contained therein had been expressly enacted by the Legislature of this Province: Provided always, that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now or hereafter shall be entitled to do so, by virtue of any Act of Parliament now or hereafter to be in force.

II. And 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 authority aforesaid, 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 persons.

III. And be it further enacted by the authority aforesaid, That all actions of debt for rent, upon an indenture of demise; all actions of covenant or debt, upon any bond or other specialty; and all actions of debt or Scire Facias, upon any recognizance; and also all actions of debt upon any award, where the submission is not by specialty, or for an escape, or for money levied on any Fieri Facias; and all actions for penalties, damages, or sums of money given to the party grieved, by any Statute now or hereafter to be in force, that shall be sued or brought at any time after the passing of this Act, shall be commenced and sued within the time and limitation hereinafter expressed, and not after, that is to say: The said actions of debt for rent, upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt, or Scire Facias upon recognizance, within ten years after the passing of this Act, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the passing of this Act, or within two years after the cause of such actions or suits, but not after; and the said other actions, within three years after the passing of this Act, or within six years after the cause of such actions or suits, but not after: Provided, that nothing herein contained shall extend to any action given by any Statute, where the time for bringing such action is or shall be by any Statute specially limited.

IV. And be it further enacted by the authority aforesaid, That if any person or persons that is or are, or shall be entitled to any such action or suit, or to such Scire Facias, is or are, or shall be at the time of any such cause of action accruing, within the age of twenty-one years, femme covert, *non compos mentis*, or without the limits of this Province, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discover, of sound memory, or returned to this Province, as other persons having no such impediment should, according to the provisions of this Act, have done; and that if any person or persons, against whom there shall be any such cause of action, is or are, or shall be at the time such cause of action accrued, without this Province, the person or persons entitled to any such cause of action shall be at liberty to bring

the same against such person or persons, within such times as are before limited, after the return of such person or persons to this Province: Provided always, that if any acknowledgment shall have been made, either by writing signed by the party liable, by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment, or part satisfaction, on account of any principal or interest being due thereon, it shall and may be lawful for the person or persons entitled to such actions, to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing, or part payment, or part satisfaction, as aforesaid; or in case the person or persons entitled to such action shall, at the time of such acknowledgment, be under such disability, as aforesaid, or the party making such acknowledgment be, at the time of making the same, without this Province, then within twenty years after such disability shall have ceased, as aforesaid, or the party shall have returned to this Province, as the case may be; and the Plaintiff or Plaintiffs in any such action, on any indenture, specialty, or recognizance may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this Statute.

V. And be it further enacted by the authority aforesaid, That if in any of the said actions, Judgment be given for the Plaintiff, and the same be reversed for Error in a Court of Error or Appeal, or if a verdict pass for the Plaintiff, and upon matter alleged in arrest of Judgment, the Judgment be given against the Plaintiff, that he take nothing for his plaint, writ, or bill, or if in any of the said actions the Defendant shall be outlawed, and shall reverse the outlawry, that in all such cases the party Plaintiff, his executors, or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such Judgment reversed, or such Judgment given against the Plaintiff, or outlawry reversed, and not after.

VI. And be it further enacted by the authority aforesaid, 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 stated 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.

VII. And be it further enacted by the authority aforesaid, 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.

VIII. And be it further enacted by the authority aforesaid, That no plea in abatement for 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.

IX. And be it further enacted by the authority aforesaid, 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 person 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.

X. And be it further enacted by the authority aforesaid, That no wager of Law, shall be hereafter allowed.

XI. And be it further enacted by the authority aforesaid, That an action of debt on simple contract shall be maintainable in any Court of Common Law, against any Executor or Administrator.

XII. And whereas it is expedient to lessen the expense of the proof of written or printed documents or copies thereof, on the trial of causes: Be it further enacted by the authority aforesaid, that it shall and may be lawful for the Judges of His Majesty's Court of King's Bench in this Province, or the major part of them, as aforesaid, at any time within five years after this Act shall take effect, to make regulations by general rules or orders, from time to time, in Term or in Vacation, touching the voluntary admission, upon an application for that purpose, at a reasonable time before the trial, of one party to the other, of all such written or printed documents, or copies of documents as are intended to be offered in evidence on the said trial by the party requiring such admission, and touching the inspection thereof before such admission is made, and touching the costs which may be incurred by the proof of such documents or copies on the trial of the cause, in case of the omitting to apply for such admission, or the not producing of such document or copies for the purpose of obtaining admission thereof, or of the refusal to make such admission, as the case may be, and as to the said Judges, or a majority of them, shall seem meet, and all such Rules and Orders shall be binding and obligatory in the said Court, and of the like force as if the provisions therein contained had been expressly enacted by Parliament.

XIII. And be it further enacted by the authority aforesaid, 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 Prosecution; Criminal Conversation, or Debauching of the Plaintiff's Daughter or Servant), by leave of any Court of Record where such action is pending, or of a Judge thereof, 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, as the said Judges of His Majesty's Court of King's Bench, or a majority of them, as aforesaid, by any Rules or Orders by them to be from time to time made, shall order and direct.

XIV. And whereas unnecessary delay and expense is sometimes occasioned, by the trial of local actions in the District where the cause of action has arisen: Be it therefore enacted by the authority aforesaid, that in any action depending in the Court of King's Bench, the venue in which is by Law local, the Court or any Judge thereof may, on application of either party, order the issue to be tried, or damages to be assessed, in any other District than that in which the venue is laid, and for that purpose the said Court or a Judge thereof, may order a suggestion to be entered on the Record, that the trial may be more conveniently had or damages assessed, in the District where the same is ordered to take place.

XV. And whereas great expense is often incurred, and delay or failure of Justice takes place at trials, by reason of variances as to some particular or particulars between the proof and the Record, or setting forth on the Record, on which the trial is had, of contracts, 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 in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence, and the Record: 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 by the authority aforesaid, that it shall be lawful for any Court of Record holding plea in Civil Actions, and for any Judge sitting at Nisi Prius, if such Court or Judge shall see fit so to do, to cause the Record, Writ or Document, on which any trial may be pending before any such Court or Judge in any Civil Action, or in any Information in the nature of a Quo Warranto, or proceedings on a Mandamus, when any variance shall appear between the proof and the recital or setting forth on the Record, Writ or Document, in which the trial is proceeding, of any contract, name or other matter, in any particular or particulars, in the judgment of such Court or Judge 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 some 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 or Judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such Court or Judge 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 or Judge 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 or Judge 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 regard to the liability of Witnesses to be indicted for perjury and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius, the order for the amendment shall be endorsed on the Postea, and returned together with the Record, and thereupon such Papers, Rolls and other Records of the Court from which such Record issued, as it may be necessary to amend, shall be amended accordingly, and the order for amendment shall be entered on the Roll or other Document upon which the trial shall be had: Provided that it shall be lawful for any party who is dissatisfied with the decision of such Judge at Nisi Prius, respecting his allowance of any such amendment, to apply to the Court from which such Record issued for a new trial upon that ground, and in case any such Court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the Court shall think fit, or the Court shall make such other order as to them may seem meet.

XVI. And be it further enacted by the authority aforesaid, That the said Court or Judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the Record 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, and notwithstanding the finding on the issue joined, the Court from which the Record issued, 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.

XVII. And be it further enacted by the authority aforesaid, That it shall be lawful for the parties in any action or information after issue joined, by consent and by order of any of the Judges of the Court in which the action is depending, 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 of Nolle Prosequi, immediately after the decision of the case, or otherwise, as the Court may think fit, and judgment shall be entered accordingly.

XVIII. And in order to render the rejection of Witnesses on the ground of interest less frequent, be it further enacted by the authority aforesaid, 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 for 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.

XIX. And be it further enacted by the authority aforesaid, 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 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 endorsement on entry shall be sufficient evidence that such

Witness was examined, in any subsequent proceeding, on which the verdict or judgment shall be offered in evidence.

XX. And be it further enacted by the authority aforesaid, That upon all debts or sums certain, payable at a certain time, or otherwise, the Jury on the trial of any issue, or on any assessment of damages, may, if they shall think fit, allow interest to the Creditor, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written Instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the Debtor that interest will be claimed from the date of such demand until the time of payment: Provided that interest shall be payable in all cases in which it is now payable by Law, or in which it has been usual for a Jury to allow interest.

XXI. And be it further enacted by the authority aforesaid, That the Jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give interest in the nature of damages over and above the value of the goods at the time of the conversion or seizure, in all actions of Trover, or Trespass de bonis asportatis, and over and above the money recoverable in all actions on Policies of Assurance, made after the passing of this Act.

XXII. And be it further enacted by the authority aforesaid, That if any person shall sue out any Writ of Error or Appeal, upon any judgment whatsoever, given in any Court in any action personal, and the Court of Error or Appeal shall give judgment for the Defendant in error, then interest shall be allowed by the Court of Error or Appeal, for such time as execution has been delayed by such Writ of Error or Appeal, for the delaying thereof.

XXIII. And be it further enacted by the authority aforesaid, That in every action brought by any Executor or Administrator in right of the Testator or Intestate, after the time this Act shall go into effect, such Executor or Administrator shall, unless the Court in which such action is brought, or a Judge thereof shall otherwise order, be liable to pay costs to the Defendant in case of being non-suited, or a verdict passing against the Plaintiff, and in all other cases in which he would be liable, if the 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.

XXIV. And be it further enacted by the authority aforesaid, That when 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 cause 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.

XXV. And be it further enacted by the authority aforesaid, That where any Nolle Prosequi shall have been entered upon any Count, or as to part of any Declaration, the Defendant shall be entitled to and have judgment for his reasonable costs in that behalf.

XXVI. And be it further enacted by the authority aforesaid, 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 Demandant, or for or against a Defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given, shall also have judgment to recover his costs in that behalf.

XXVII. And be it further enacted by the authority aforesaid, That it shall be lawful for the Executors or Administrators of any Lessor or Landlord, to distraint 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.

XXVIII. And be it further enacted by the authority aforesaid, 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.

XXIX. And whereas, it is expedient to render references to Arbitration more effectual, be it further enacted by the authority aforesaid, That the power and authority of any Arbitrator or Umpire appointed by, or in pursuance of any rule of Court, or Judges' order or orders of Nisi Prius, 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 His Majesty's Court of King's Bench, 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 an 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.

XXX. And be it further enacted by the authority aforesaid, 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 of 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 place where such Witness is residing at the time: 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, or to attend at more than two consecutive days, to be named in such order.

XXXI. And be it further enacted by the authority aforesaid, 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 Arbitrator or Umpire, or for any one Arbitrator, and he or they are hereby authorised and required to administer an Oath to such Witnesses, or take their Affirmation in cases where Affirmation is allowed by Law instead of an 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 may be prosecuted, and punished accordingly.

XXXII. And whereas, in cases where Writs of Execution have been issued into several Districts, upon which Writs property real or personal may have been seized or advertised, which property has afterwards not been sold, on account of satisfaction having been otherwise obtained, or from some other cause, it has been doubted whether a claim to poundage may not be advanced by the Sheriff of each of such Districts, respectively, although no money has been actually levied by them under such Writ: Be it therefore enacted by the authority aforesaid, That where upon any Writ of Execution sued out against the Estate, real or personal, of the Defendant, or Defendants, no money shall be actually levied, no poundage shall be allowed to the Sheriff; but he shall be allowed his Fees for the services which may be actually rendered by him, and it shall be in the power of the Court from whence such Execution shall have issued, or for any Judge thereof, in Vacation, to allow a reasonable charge to the Sheriff for any service rendered, in respect to such Execution, for which no specific fee or allowance may be assigned in the Table of Costs.

XXXIII. And be it further enacted by the authority aforesaid, That it shall not be necessary after the time this Act shall take effect, to sue out Process of Execution into that District in which the venue in any action shall be laid, for the sole purpose of warranting the suing out Process of Execution into any other District, nor need any Writ of Execution be a Testatum Writ, merely because of its being directed to the Sheriff of any other District than that in which the venue may be laid, but it shall be lawful to sue out Execution into any District of this Province, without regard to the venue having been laid in any other District: Provided always, that where it is now necessary to sue out Process of Execution against the person, into any particular District, in

order to charge Bail, the same shall still continue to be necessary, notwithstanding any thing contained in this Act.

XXXIV. And be it further enacted by the authority aforesaid, That this Statute shall commence and take effect on the first day of June next, after the passing thereof.