

Laws of His Majesty's Province of Upper Canada, passed in the year 1857. Toronto: Stewart Derbishire & George Desbarats, 1857.

20 Victoria – Chapter 5

An Act to amend the Laws in Upper Canada, respecting Appeals, and to alter the Constitution of the Court of Error and Appeal. Assented to 27th May, 1857.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

- I. The thirty-ninth section of an Act of the Parliament of Canada, passed in the twelfth year of Her Majesty's Reign, intituled, *An Act to make further provision for the administration of Justice, by the establishment of an additional Superior Court of Common Law, and also a Court of Error and Appeal, in Upper Canada, and for other purposes*, is hereby repealed.
- II. The Court of Error and Appeal shall be composed henceforth of the Judges of the several Courts of Queen's Bench, Chancery and Common Pleas in Upper Canada, who shall be ex officio members thereof, and of such other persons being Barristers of the Upper Canada Bar, and having held the office of Judge of some or one of the Superior Courts of Common Law or Equity in Upper Canada, as the Governor of this Province shall, by Commission under the Great Seal thereof, appoint to be a Judge of and in the said Court of Error and Appeal, and every person to be so appointed shall take such rank and precedence, after the Chief Justice of the Court of Queen's Bench, the Chancellor of Upper Canada, and the Chief Justice of the Court of Common Pleas, in that Court, as shall be designated in his Commission.
- III. The Court of Error and Appeal so composed shall have, possess, exercise and enjoy the same powers and authorities as are contained and conferred in and by the above mentioned Act passed in the twelfth year of Her Majesty's Reign.
- IV. The Court of Error and Appeal shall hold its sittings at the city of Toronto, on the second Thursday next after the several Terms of Hilary, Blaster and Michaelmas, and shall have power to adjourn from time to time, and to meet again at the time fixed by such adjournment, for the transaction of business; and the Chief Justice of the Court of Queen's Bench, for the time being, and in his absence, the Judge of the said Court entitled to precedence over all the Judges actually present, shall preside therein, and seven members of the Court shall be necessary to constitute a quorum.
- V. All appeals which shall be depending in the said Court at the time this Act shall come into force, shall be carried on under the provisions of this Act, but where any such appeals shall be standing for Judgment, Judgment may be given as if this Act had not been passed.
- VI. The Court of Error and Appeal shall have power to quash proceedings in all cases brought before it, in which Error or Appeal does not lie, or where such proceedings are taken against good faith, or in

any case in which proceedings might heretofore have been quashed in the said Court, according to the law and practice in England.

VII. The Court of Error and Appeal shall in all cases have power to dismiss the Appeal, or to give such Judgment or Decree, and to award such process or other proceeding as the Court whose decision is appealed against ought to have given, without regard to the party alleging Error, and may also award restitution and payment of costs; and the Judgment, Decree or Award shall be certified by the Clerk of the Court of Error and Appeal to the proper Officer of the Court below, who shall thereupon make all proper and necessary entries thereof, and all subsequent proceedings maybe taken thereupon, as if the Judgment, Decree or Award had been originally given in and by the Court below.

VIII. The appellant shall in all cases be at liberty to discontinue his proceedings by giving to the respondent a notice headed in the Court and cause, and signed by the appellant or his Attorney, stating that he discontinues such proceedings; and thereupon the respondent shall be at once entitled to the costs of and occasioned by the proceedings in Appeal, and may either sign judgment for such costs, or obtain an Order for their payment in the Court below, and may take all further proceedings in the Court below as if no appeal had been brought.

IX. The respondent shall in all cases be at liberty to consent to the reversal of the Judgment, decree or proceeding appealed against, by giving to the appellant a notice headed in the Court and cause, and signed by the respondent or his Attorney, stating that he consents to the reversal of such Judgment, decree or other proceeding, and thereupon the Court shall pronounce Judgment of reversal as of course.

X. The death of the appellant after the security required by law to be given by him shall have been perfected, and have been, or shall stand allowed, shall not cause the appeal to abate, but it may be continued as hereinafter mentioned.

XI. The death of the respondent shall not cause the appeal to abate, but it may be continued as hereinafter mentioned.

XII. The marriage of a woman appellant or respondent, shall not abate the appeal, but the proceedings in error and appeal shall go on as if no such marriage had taken place, and the decision of the Court shall be certified as in other cases.

And as to appeals from the Court of Queen's Bench and Common Pleas; Be it enacted as follows:

XIII. An appeal shall lie upon a Judgment upon a special case in the same manner as upon a Judgment upon a special verdict, unless the parties agree to the contrary; and the proceedings for bringing a special case before the Court of Error and Appeal shall, as nearly as possible, be the same as in the case of a special verdict, and the Court of Error and Appeal are required to draw any inferences of fact from the facts stated in such special case, which the Court where it was originally decided ought to have drawn.

XIV. An appeal shall lie in all cases of rules to enter a verdict or non-suit upon a point reserved at the trial, if the rule to shew cause be refused, or if granted, be afterwards discharged or made absolute.

XV. In all cases of motion for a new trial upon the ground that the Judge has not ruled according to law, if the rule to shew cause be refused, or if granted, be afterwards discharged or made absolute, the party decided against may appeal, provided any one of the Judges dissent from the rule being refused, or when granted, being discharged or made absolute, as the case may be, or provided the Court in its discretion think fit that an appeal should be allowed; provided that where the application for a new trial is upon matter, of discretion only, as on the ground that the verdict was against the weight of evidence or otherwise, no appeal shall be allowed.

XVI. No appeal shall be allowed in either of the cases mentioned in the three next preceding sections, unless notice thereof be given in writing to the opposite party or his Attorney and to the Clerk of the Crown of the proper Court, within fourteen days after the decision complained of or within such further time as may be allowed by, the Court or a Judge.

XVII. An appeal shall lie in ejectment in the same¹ manner find to the same extent as in any other case.

XVIII. An appeal shall lie in all cases in which any By-law of a Municipal Corporation has been quashed by rule of Court after argument.

XIX. No other appeals from the decision of the said Courts of Queen's Bench or Common Pleas shall be allowed, unless the judgment, decision, or other matter appealed against, shall appear of record.

XX. A Writ of Error and Appeal shall not be necessary or used in any cause, and the proceeding to appeal against any Judgment shall be a step in the cause, and shall be taken in manner hereinafter mentioned; but nothing in this Act contained shall invalidate any proceedings already taken or to be taken by reason of any Writ of Error and Appeal issued before the commencement of this Act.

XXI. Either party alleging error in law, may deliver to the Clerk of the Crown of the Court wherein the suit was instituted, a Memorandum in writing, in the form contained in the Schedule A to this Act annexed (No. 1.) or to the like effect, entitled in the Court and cause, and signed by the party or his Attorney, alleging that there is error in law in the record and proceedings, whereupon the Clerk shall file such Memorandum, and deliver to the party lodging the same a note of the receipt thereof, and a copy of such note, together with a statement of the grounds of error, intended to be argued, may be served on the opposite party or his Attorney.

XXII. Proceedings in any appeal from decisions in the Courts of Common Law shall be deemed a supersedeas of execution from the time of the perfecting and allowance of the security required by the fortieth section of the above mentioned Act, passed in the twelfth year of Her Majesty's Reign; Provided always, that if the grounds of Error or Appeal shall appear to be frivolous, the Court whose judgment is appealed from, or a Judge upon summons, may order execution to issue.

XXIII. The assignment of and joinder in error in law shall not be necessary or used, and instead thereof a suggestion to the effect that error is alleged by the one party and denied by the other, may be entered on the Judgment-roll, in the form contained in Schedule A to this Act annexed (No. 2.) or to the like effect; Provided that in case the respondent intends to rely upon the proceeding in error being barred by lapse of time or by release of error or other like matter of fact, he may give four days' notice in writing to the appellant, to file and serve a copy of his grounds of error and appeal as heretofore; instead of entering the suggestion, and he shall within eight days plead thereto the bar by lapse of time, or release of error or other like matter of fact, and thereupon further proceedings may be had according to the law and practice in England.

XXIV. The roll shall be made up, and the suggestion last aforesaid entered by the appellant, within ten days after the service of the note of the receipt of the Memorandum alleging error, or within such other time as the Court or a Judge may order, and in default thereof, or of assignment of error in cases when an assignment is required, the respondent, his executors or administrators, shall be at liberty to sign Judgment of non pros.

XXV. In case of an Appeal on a Judgment given against several persons, and one or some only shall appeal, the Memorandum alleging error, and the note of the receipt of such Memorandum shall state the names of the persons who appeal, and in case the other persons against whom Judgment has been given decline to join in the appeal, the same may be continued and the suggestion last aforesaid entered, stating the persons who appeal without any summons and severance, or if such other parties elect to join, then the suggestion shall state them to be and they shall be deemed appellants although not mentioned as such in previous proceedings.

XXVI. Upon such suggestion of error alleged and denied being entered, and after the security required to be given by the appellant shall have been duly allowed, the cause may be set down for argument in the Court of Error and Appeal as heretofore, and the Clerk of the Court appealed from shall, on payment of his lawful fees, prepare a full transcript of the Judgment appealed from and certify the same under the seal of the Court, and shall forthwith transmit the same to the Clerk of the Court of Error and Appeal.

XXVII. In cases of appeals upon motions or rules for new trials, or to enter a verdict or non-suit, or upon rules whereby any by-law is quashed, such appeal shall be upon a case to be stated by the parties (and in case of difference to be settled by the Court or a Judge of the Court appealed from) in which shall beset forth so much of the pleadings, evidence, affidavits, documents and the ruling or judgment objected to as may be necessary to raise the question for the decision of the Court of Error and Appeal; and the case so stated and settled shall be forthwith delivered by the appellant to the Clerk of the Court of Error and Appeal, and the cause may, after the security required to be given by the appellant shall have been duly allowed, be set down for argument.

XXVIII. The appellant shall deliver to the said Clerk at least four dear days before the day appointed, for hearing the argument, for the use of the Judges, a copy for each of the Judges of the transcript of the Judgment or of the case mentioned in the last section, as the case may be, or in default thereof the appeal may be dismissed with costs.

XXIX. In case of the death of one of several appellants, a suggestion may be made of such death, which suggestion shall not be traversable but shall only be subject to be set aside if untrue, and the proceedings may be thereupon continued at the suit of and against the surviving appellant, as if he were the sole appellant.

XXX. In case of the death of the sole appellant, or of all the appellants, the legal representative of the sole appellant, or of the last surviving appellant may, by leave of the Court or a Judge, enter a suggestion of the death, and that he is such legal representative, which suggestion shall not be traversable but shall only be subject to be set aside if untrue, and the proceedings may thereupon be continued at the suit of and against such legal representative as the appellant, and if no such suggestion shall be made the respondent may proceed to an affirmance of the Judgment according to the practice of the Court, or take such other proceedings as he may be entitled to.

XXXI. In case of the death of one of several respondents, a suggestion may be made of such death, which suggestion shall not be traversable but shall only be subject to be set aside if untrue, and the proceedings may be continued against the surviving respondent.

XXXII. In case of the death of a sole respondent or of all the respondents, the appellant may proceed upon giving one month's notice of the appeal, and of his intention to continue the same to the representative of the deceased respondents, or if no such notice can be given, then by leave of the Court or a Judge, upon giving such notice to the parties interested, as the Court or Judge may direct.

XXXIII. If a woman being appellant or respondent shall marry pending the appeal, and Judgment shall be given for her, execution may thereupon be issued in the Court below, by the authority of the husband, without any suggestion or Writ of Revivor, and if Judgment be given against her, such Judgment may be executed in the Court below against the wife alone, or by suggestion or Writ of Revivor pursuant to the Common Law Procedure Act, 1856, Judgment may be obtained against the husband and wife, and execution may issue thereon.

And as to appeals from the Court of Chancery; Be it enacted as follows:

XXXIV. Every party desirous of appealing from any Decree or Order in the said Court of Chancery, shall file a petition of appeal to be in the form contained in Schedule A to this Act annexed (No. 3.) with the Clerk of the Court of Error and Appeal, and a copy thereof, together with a notice of the hearing of the appeal, shall be served on the respondent, his Solicitor or agent, at least two months before the time named in such notice for the hearing of the appeal, and such petition shall not be answered, but at the time, named in the notice the parties must attend to argue the appeal, and after the filing of the petition and service of a copy thereof, and of the notice aforesaid, proceedings shall go on as if the petition had been answered and the time named in the notice had been appointed by the Court for hearing the appeal.

XXXV. In appeals from any decree or order of the Court of Chancery, it shall be the duty of the appellant to bring the same to a hearing within the time following, that is to say: upon appeal from any

decree or decretal order, within one year from the pronouncing of such decree or decretal order; and upon appeal from any interlocutory order, not being a decretal order, within six calendar months from the pronouncing of the same, or within such further time as may be allowed for that purpose by the said Court of Error and Appeal, or by the Court of Chancery or a Judge thereof, upon special grounds shewn to the satisfaction of the Court or Judge granting the same: Provided always, that as to any decrees or orders which, under any general orders of the Court of Chancery, do not become absolute upon the same being pronounced, the time limited for appealing therefrom shall be computed from the time when the same shall have become absolute.

And with respect to the giving security in cases of appeal to Her Majesty, in Her Privy Council, and to costs in such cases, of appeal; Be it enacted as follows:

XXXVI. Every Judge of the Court of Error and Appeal shall have authority to approve of and allow the Bond or other security to be given by any party who intends to appeal to Her Majesty in Her Privy Council, whether the application for such allowance be made during any of the terms appointed for the sitting of the said Court, or at any other time: Provided always, that every Appeal to Her Majesty in Her Privy Council shall be made and entered there within six months from the date or time of the allowance of said Bond or other security, and pressed to a hearing and conclusion there, with all reasonable speed, in default whereof the Court in which the Judgment shall have been originally pronounced may, in its discretion, by rule of the same Court, order proceedings to be had and pursued upon the Judgment of the said Court of Error and Appeal as if such Judgment were and stood confirmed by Her Majesty in Her said Privy Council at the time of the making of such rule.

XXXVII. Any costs awarded by any decree or order of Her Majesty, in Her Privy Council, upon an appeal from the said Court of Error and Appeal, shall, be recoverable by the same process as costs awarded by the said Court of Error and Appeal.

And in order to enable the Judges to carry this Act thoroughly into effect by making rules and regulations, and to frame all necessary proceedings for that purpose; Be it enacted as follows:

XXXVIII. It shall be lawful for the Judges of the said Court, or any five or more of them, of whom the Chief Justice of the Court of Queen's Bench and the Chancellor shall be two, from time to time to make all such general rules and orders for the effectual execution of this Act, and of the intention and object thereof, and for fixing the costs to be allowed for and in respect of proceedings in the said Court, and for regulating the different proceedings in appeal, as to them may seem expedient for any of the said purposes; and also from time to time to alter and amend any of the existing rules, or any rules to be made under the authority of this Act, and to make other rules instead thereof: Provided always, that until such rules are made, the present' rules and the existing practice and mode of proceeding of and in the said Court, except so far as changed, modified and superseded by the provisions of this Act, shall continue and remain in force.

Schedule A

Referred to in the foregoing Act.

No. 1.

In the (Q. B. or C. P.)

The _____ day of _____, in the year of our Lord, 18_____.

(The day of lodging note of Error.)

A. B. and C. D.

The plaintiff (or defendant) says that there is error in law in the record and proceedings in this action, and the defendant (or plaintiff) says that there is no error therein.

(Signed) A. B. Plaintiff.
 (or C. D. Defendant)
 (or E. F. Attorney for Plaintiff or Defendant.)

No. 2.

The _____ day of _____, in the year of our Lord, 18_____.

(The day of making the entry on the Roll.)

The plaintiff (or defendant) says that there is error in the above record and proceedings, and the defendant (or plaintiff) says there is no error therein.

No. 3.

In the Court of Error and Appeal.

Between A. B. Appellant, and C. D., Respondent.

To the honorable the Judges of the said Court.

The petition of the said A. B. sheweth:

That a Decree (or Order) was on _____ pronounced by Her Majesty's Court of Chancery for Upper Canada, in a certain cause depending in the said Court, wherein your petitioner was plaintiff (or defendant) and the above named C. D. was defendant (or plaintiff), which said Decree (or Order) has been duly entered and enrolled.

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That your petitioner hereby appeals from the said Decree (or Order) and prays that the same may be reversed or varied, or that such other Decree (or Order) in the premises may be made as to your honorable Court shall seem meet.

And your petitioner will ever pray, &c.

(Certificate of Counsel to be added.)