

a mis-joinder of defendants, such mis-joinder may be amended as a variance at the trial in like manner as the mis-joinder of Plaintiffs has been hereinbefore directed to be amended, and upon such terms as the Court or Judge or other presiding officer by whom such amendment is made shall think proper. 5

If the non-joinder of Defendants is pleaded in abatement in such action.

LXXI. In any action on contract where the non-joinder of any person or persons as co-Defendant or co-Defendants has been pleaded in abatement, the Plaintiff shall be at liberty, without any order, to amend the Writ of Summons and the declaration by adding the name or names of the person or 10 persons named in such plea in abatement as joint contractors, and to serve the amended Writ upon the person or persons so named in such plea in abatement, and to proceed against the original Defendant or Defendants and the person or persons so named in such plea in abatement; Provided that the date 15 of such amendment shall, as between the person or persons so named in such plea of abatement and the Plaintiff, be considered for all purposes as the commencement of the action.

Proviso.

Costs of such plea in abatement, &c.

LXXII. In all cases after such plea in abatement and amendment, if it shall appear upon the trial of the action that the 20 person or persons so named in such plea in abatement was or were jointly liable with the original Defendant or Defendants, the original Defendant or Defendants shall be entitled as against the Plaintiff to the costs of such plea in abatement and amendment; but if at such trial it shall appear that the original 25 Defendant or any of the original Defendants is or are liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties, the Plaintiff shall nevertheless be entitled to Judgment against the other Defendant or Defendants who shall appear to be 30 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 together with the costs on the plea in abatement and amendment, as costs in the cause against the original Defendant or Defendants who shall 35 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. 40

Judgment as regards Defendants liable or not liable, respectively.

Proviso.

Action - not to abate by reason of non-joinder of joint contractor, &c., unless it be averred and sworn that he lives in Upper Canada.

LXXIII. Provided always that in any action to be brought in Upper Canada against any joint obligor or contractor, the action shall not abate on account of any other joint obligor or contractor not being made a Defendant, unless the party pleading such non-joinder shall aver in his plea that such joint 45 obligor or contractor is living within the limits of Upper Canada, and shall state the place of his residence, nor unless an affidavit of the truth of such plea be filed therewith.