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No. 109.

4th Session, 3rd Parliament, 14 Victoria, 1851.

BILL.

An Act to simplify the Administration
of Justice in Civil Actions in Upper
Canada.

Received and read a first time, Wednesday, 11th
June, 1851.

Second reading, Wednesday, 2nd July, 1851.

Hon. Mr. BOULTON.

TORONTO: PRINTED BY LOVELL AND GIBSON.

BILL.

An Act to simplify the Administration of Justice in Civil Actions in Upper Canada.

WHEREAS it is expedient to abolish the technical distinctions which now exist between forms of action at Common Law, and also between legal and equitable remedies, which it is desirable should henceforth be administered by the same tribunals: Be it therefore enacted, as follows:

I. That an Act of the late Parliament of Upper Canada, Acts 7 W. 4 passed in the seventh year of the Reign of his late Majesty King William the Fourth, entitled, "*An Act to establish a Court of Chancery in this Province*;" also two several Acts of the Parliament of Canada, passed in the twelfth year of the Reign of Her present Majesty, entitled respectively, "*An Act for the more effectual administration of Justice in the Court of Chancery in the late Province of Upper Canada*," and also "*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Common Law, and also a Court of Error and Appeal in Upper Canada, and for other purposes*," be and the same are hereby repealed.

II. The Court of Queen's Bench shall be presided over by a Chief Justice and five Puisne Judges, of whom not more than four shall sit together to hear causes, except when they shall sit as hereinafter provided for re-hearings, and shall possess an equitable as well as legal jurisdiction, and have power to pronounce judgment upon the facts established in each cause, either in accordance with the principles of law or equity, as the merits and justice of the case may require, without reference to the form of proceeding that may have been adopted to ascertain such facts; and that the County Courts within their respective Jurisdictions shall have the same authority.

III. The said Judges of the Queen's Bench may in their discretion sit in divisions of two each to hear causes, or four of the said Judges may hold one Court, as the Judges shall deem most beneficial for the expedition of business.

IV. One of the Judges shall sit in chambers every day if occasion require, to hear matters of practice and other

ordinary chamber business, at such convenient periods as the Court shall ordain.

In Equity.

V. One other of the said Judges shall sit to hear matters of an equitable nature, to be by him determined, subject to a re-hearing as after provided. 5

Court for rehearings.

VI. On the *Monday* week after the last day of each Term, to obviate the expense of a Court of Appeal, all the Judges who shall not be prevented by some reasonable cause from attending, shall sit and hold a Court to rehear such causes as may be entered for rehearing, 10 such sittings being continued from day to day, or adjourned to a future day, as the Court shall be advised.

Rehearings.

VII. Causes heard by one Judge in Equity, or in Term by two or more Judges, may be reheard by the full Court after term, if either party shall, upon signature of 15 counsel, be so advised.

Forms of action, &c. abolished.

VIII. The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing as technical pleadings or modes of procedure, are abolished, and there shall be hereafter 20 in Upper Canada but one description of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action, under which the party complaining shall be known as the plaintiff, and the adverse party as de- 25 fendant.

Certain writs abolished.

IX. Writs of *mandamus*, *quo warranto*, and *scire facias*, injunctions and *certiorari* are abolished, and the Court, upon motion in Term, or a Judge in vacation, may grant rules, either absolute in the first instance, or to shew 30 cause, as shall be deemed proper for the redress of the the wrongs, attainment of the objects, or enforcement of right, for which those writs have heretofore been sued out.

Feigned issues abolished.

X. Feigned issues are abolished, and when a question of fact, not put in issue by the pleadings, is to be tried 35 by a Jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried, and such order shall be the only authority necessary for the trial thereof.

Parties to actions.

XI. Every action must be prosecuted in the name of 40 the real party in interest, except in case of executors or administrators, trustees of an express trust, and persons expressly authorised by statute.

Defences to action by an assignee.

XII. In the case of an assignment of a thing in action not heretofore assignable at law by mere endorsement, 45 the action by the assignee shall be without prejudice to

any set off or other defence existing at the time of or before notice of the assignment.

XIII. An executor or administrator, a trustee of an ^{Executors, &c.} express trust, or a person expressly authorised by statute, may sue without joining with him the persons for whose benefit the suit is prosecuted.

XIV. When a married woman is a party, her husband ^{When a married woman may sue alone.} must be joined with her, except that,

1. When the action concerns her separate property she may sue alone.

2. When the action is between herself and her husband she may sue or be sued alone.

XV. When an infant is a party he must appear by ^{Infants.} guardian, who may be appointed by the Court in which the action is prosecuted, or by a Judge thereof, or a County Judge.

XVI. The guardian shall be appointed as follows: ^{Guardians how appointed.}

1. When the infant is plaintiff, upon the petition of the infant if he be of the age of fourteen years, or if he be under that age upon the petition of some other party to the suit or of a relative or friend of the infant.

2. When the infant is defendant, upon the petition of the infant, if he be of the age of fourteen years, and apply within twenty days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the petition of any other party to the action, or of a relative or friend of the infant.

XVII. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be ^{Joint plaintiffs.} joined as plaintiffs, except as otherwise hereinbefore provided.

XVIII. Actions for the following causes must be tried in the County in which the subject of the action or some part thereof is situated, subject to the power of the Court ^{Where actions must be tried.} to change the place of trial, in the cases provided by statute.

1. For the recovery of real property or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property.

2. For the partition of real property.

3. For the foreclosure of a mortgage of real property.

4. For the recovery of personal property, distrained for any cause.

The same.
Power to
change place
of trial.

XIX. Actions for the following causes must be tried in the County where the cause or some part thereof arose, subject to the power of the Court to change the place of trial where any special causes shall exist for so doing. 5

Penalties.

1. For the recovery of a penalty or forfeiture imposed by statute; except, that when it is imposed for an offence committed on a lake or river, situated in or opposite to two or more Counties, the action may be brought in any 10 County bordering on such lake, river or stream, and opposite to the place where the offence was committed.

Public
officers.

2. Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his com- 15 mand or in his aid, shall do anything touching the duties of such officer.

General rule
in other cases.

Exception.

XX. In all other cases the action shall be tried in the County in which the parties or any of them shall reside at the commencement of the action; subject, however, 15 to the power of the Court to change the place of trial, according to the justice of the case.

If a wrong
County be
named in
the complaint.

XXI. If the County designated for that purpose in the complaint be not the proper County, the action may, notwithstanding, be tried in the county named, unless the 20 defendant shall, before the time for answering expire, demand in writing that the trial be had in the proper County.

OF THE MANNER OF COMMENCING CIVIL ACTIONS.

Actions, how commenced.

Summons, requisites of.

Notice to be inserted in certain actions.

Complaint need not be served with summons.

In such case what to be stated in summons, and proceedings thereon.

Defendant unreasonably defending, when to pay costs.

Notice of pendency of action affecting title to real property.

Summons, by whom served.

Summons, how served and returned.

Publication when defendant cannot be found.

Proceedings when there are several defendants, and part only served.

When service deemed made in case of publication.

Service of summons, how proved.

When jurisdiction of action acquired.

Civil actions
how
commenced.

XXII. Civil actions in the courts of record of this Province shall be commenced by the service of a summons. 25

The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the jurisdiction of the Court to be therein specified, and in which there is a Post Office, within *twenty days* after the service of the summons, exclusive of the day of service.

XXIII. The plaintiff shall also insert in the summons a Notice on the summons.
10 notice, in substance as follows :

1. In an action, arising on contract for the recovery of money only,—that he will take judgment for a sum specified therein, if the defendant fail to answer the complaint, in *twenty days* after the service of the summons.
15 mons.

2. In other actions,—that if the defendant shall fail to answer the complaint, within twenty days after service of the summons, the plaintiff will apply to the Court for the relief demanded in the complaint.
20

XXIV. A copy of the complaint need not be served with the summons. In such case, the summons shall state where the complaint will be fyled; and if the defendant, within ten days thereafter, in person or by attorney, demand, in writing, a copy of the complaint, specifying a place within the Jurisdiction of the Court where it may be served, a copy thereof shall be served accordingly, and after such service the defendant shall have *twenty days* to answer; but only one copy need be served on the same attorney. In the case of a defendant against whom no personal claim is made in an action for the partition of real property, or for the foreclosure of a mortgage, the Plaintiff may deliver to such defendant, with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, and that no personal claim is made against such defendant, in which case no copy of the complaint need be served on such defendant, unless within the time for answering he shall in writing demand the same.
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30
35
40

XXV. The copy of any complaint or other proceeding in a cause, subsequent to the summons, may be sent to the defendant by Mail, marked "Law Proceeding," with the name of the writer thereunder written, and it shall be the duty of the Post Master to send the same forthwith to the person addressed, charging *six pence* per mile for travelling to the residence of the party, besides the Postage, which the party shall be bound to pay, if he accepts the letter. If he will not accept it, the Postmaster shall return the same to the writer as a refused letter, and he
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Complaint, &c. may be sent by Mail.

Complaint need not be fyled with summons.
Notice, &c. in such case.

shall be bound to pay the charges to the Postmaster, and may proceed in the suit, as if the paper had been regularly served.

Actions affecting title to real property.

XXVI. In an action affecting the title to real property, the plaintiff, at the time of commencing the action, or at any time afterwards, may file with the Clerk of each County in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in that County affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed *twenty days* before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. From the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer, of the property affected thereby.

Service of summons, by whom made, &c.

XXVII. The summons may be served by the Sheriff of the County where the defendant may be found, or by any other person not a party to the action. The service shall be made, and the summons returned, with proof of the service, to the person whose name is subscribed thereto, with all reasonable diligence. The person subscribing the summons may, at his option, by an endorsement on the summons, fix a time for the service thereof, and the service shall then be made accordingly.

How the service shall be made.

XXVIII. The summons shall be served by delivering a copy thereof as follows:

Corporations.

1. If the suit be against a Corporation, to the President or other head of the Corporation, Secretary, Cashier, or Managing Agent thereof;

Minors.

2. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother or guardian, or if there be none within the Province, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

Non Composites.

3. If against a person judicially declared to be of unsound mind, and for whom a Committee has been appointed, to such Committee, and to the defendant personally.

Other cases.

4. In all other cases to the defendant personally.

When the defendant cannot be found in the Province.

XXIX. Where the person on whom the service is to be made, cannot, after due diligence, be found within the Province, and that fact shall appear by affidavit to the satisfaction of a Court or Judge thereof, or a County Judge,

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and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to an action relating to real property in Upper Canada; such Court or Judge may grant an order that the service be made, by the publication of a summons in either of the following cases :

- 1. Where the defendant is a foreign corporation ; Foreign corporation.
- 2. Where the defendant, being a resident of this Province, has departed therefrom, with intent to defraud his creditors, or avoid the service of a summons, or keeps himself concealed therein, with the like intent, and the action arises out of contract, or the non-feasance or misfeasance complained of, is a breach of contract ; Absconding debtors.
- 3. Where he is a non-resident but has property in Upper Canada, and the action is on contract, and the Court has jurisdiction of the subject of the action ; Non-resident, but having property in U. C.
- 4. Where the subject of the action is real or personal property in Upper Canada, and the defendant has, or claims, a lien or interest, actual or contingent therein, or the relief demanded consists, wholly or partly, in excluding the defendant from any interest therein ; Property in dispute in U. C.
- 5. Where the action is founded on a mortgage upon property in Upper Canada, and the defendant is personally chargeable with the debt for which the mortgage is a security ; Mortgages on lands in U. C.

XXX. The order shall direct the publication to be made in two newspapers, to be designated as most likely to give notice to the persons to be served, and for such length of time as shall be deemed reasonable, not less than once a week for six weeks. In case of publication, the Court or Judge shall also direct a copy of the summons and complaint to be forthwith deposited in the Postoffice, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint, out of the Province, shall be equivalent to publication and deposit in the postoffice. If the summons shall not be personally served on a defendant, nor received by such defendant through the postoffice, in the cases provided for in this section, he or his representatives shall, on application and sufficient cause shown, at any time before judgment, be allowed to defend the action ; and the defendant or his representatives, may in like manner be allowed to defend after judgment, or at any time within one year after notice

Notice to be given for summoning absentees, &c.

thereof, and within seven years after its rendition, on such terms as shall be just; and if the defence be successful, and the judgment, or any part thereof, shall have been collected or otherwise enforced, such restitution may thereupon be compelled as the Court shall direct. And ⁵ in all cases where publication is made, the complaint shall be first fyled, and the summons, as published, shall state the time and place of such fyling.

Divers
defendants,
and some not
served.

XXXI. Where the action is against two or more defendants, and the summons is served on one or more, but 10 not on all of them, the plaintiff may proceed as follows:

Joint debtors.

1. If the action be against several persons jointly indebted upon a contract, he may proceed against the defendant served in the same manner as at present, and with the like effect, unless the Court shall otherwise 15 direct; or,

If severally
liable.

2. In an action against defendants severally liable, he may proceed against the defendant or defendants served in the same manner as if such defendant or defendants were the only parties proceeded against. 20

Judgment
against
defendants
severally
liable.

3. If all the defendants have been served, judgment may be taken against any or either of them severally when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them or any of them alone. When an order shall 25 be made extending the time to answer beyond the time for which the application for the relief demanded in the complaint shall have been noticed, if the defendant fail to answer, the application for judgment may be made without further notice. 30

When service
deemed
complete.

XXXII. In the cases mentioned in section , the service of the summons shall be deemed complete, at the expiration of the time prescribed by the order for publication.

Proof of
service.

XXXIII. Proof of the service of the summons, and of 35 the complaint or notice, if any, accompanying the same shall be as follows:

1. If served by the Sheriff, his certificate thereof; or

2. If by any other person, his affidavit thereof; or

3. In case of publication, the affidavit of the printer 40 or his foreman, or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the postoffice, if the same shall have been deposited; or

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4. The written admission of the defendant :

5. In case of actual service, the certificate or affidavit shall state the time and place of the service.

XXXIV. From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the Court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. When the Court shall be held to acquire jurisdiction.

OF THE PLEADINGS IN CIVIL ACTIONS.

- The complaint.
- The demurrer.
- The answer.
- The reply.
- General rules of pleading.
- Mistakes in pleadings and amendments.

THE COMPLAINT.

- Forms of pleadings inconsistent with this Act abolished.
- First pleading to be complaint.
- Complaint, what to contain.

XXXV. All the forms of pleading heretofore existing, inconsistent with the provisions of this Act, are abolished; and hereafter, the forms of pleading in civil actions, in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are modified as prescribed by this Act. Forms inconsistent to this Act abolished.

XXXVI. The first pleading on the part of the plaintiff is the complaint. Complaint.

1. The complaint shall contain :

What it shall contain.

2. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant :

3. A statement of the facts constituting the cause of action, in ordinary and concise language, without repetition.

4. A demand of the relief, to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

THE DEMURRER.

Defendant to demur or answer.

When the defendant may demur.

Demurrer must specify grounds of objection to complaint.

How to proceed if complaint be amended.

Objection not appearing on complaint may be taken by answer.

Objection, when deemed waived.

Defendant
must demur
or answer.

XXXVII. The only pleading on the part of the defendant is either a demurrer or an answer. It must 5 be served within *twenty days* after the service of the copy of the complaint.

When he
may demur.

XXXVIII. The defendant may demur to the complaint, when it shall appear upon the face thereof either :

1. That the Court has no jurisdiction of the person of 10 the defendant, or the subject of the action ; or,

2. That the plaintiff has not legal capacity to sue ; or,

3. That there is another action pending between the same parties, for the same cause ; or,

4. That there is a defect of parties, plaintiff or de- 15 fendant ; or,

5. That several causes of action have been improperly united ; or,

6. That the complaint does not state facts sufficient 20 to constitute a cause of action.

What the
demurrer
must contain.

XXXIX. The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be treated as a nullity. It may be taken to the whole complaint, or to any of the alleged causes of action 25 stated therein.

If the
complaint be
amended.

XL. If the complaint be amended, a copy thereof must be served on the defendant, who must answer it within *twenty days*, or the plaintiff, upon filing with the Clerk a proof of the service, and of the defendant's omission, may proceed to obtain judgment, as provided by section 30

; but where an application to the Court for judgment is necessary, *eight days'* notice thereof must be given to the defendant.

5 **XLI.** When any of the matters enumerated in section **Answer.**
do not appear upon the face of the complaint,
the objection may be taken by answer.

XLII. If no such objection be taken, either by de- **If neither**
murrer or answer, the defendant shall be deemed to have **demurrer**
waived the same, excepting only the objection to the **nor answer**
10 jurisdiction of the Court, and the objection that the com- **filed.**
plaint does not state facts sufficient to constitute a cause
of action.

THE ANSWER.

Answer what to contain.
May set forth as many grounds of defence as exist.
Demurrer as to some causes of action, and answer as to others.
Sham defences to be stricken out.

XLIII. The answer of the defendant shall contain : **What the**
answer shall
contain.

15 1. In respect to each allegation of the complaint con-
troverted by the defendant, a general or specific denial
thereof, or a denial thereof according to his information
and belief, or of any knowledge thereof sufficient to form
a belief.

20 2. A statement of any new matter constituting a
defence, in ordinary and concise language, without
repetition.

25 3. The defendant may set forth by answer as many
defences as he shall have. They shall each be sepa-
rately stated, and refer to the causes of action which they
are intended to answer, in any manner by which they
may be intelligibly distinguished.

4. The defendant may demur to one or more of several
causes of action stated in the complaint, and answer the
residue.

30 5. Sham answers and defences may be stricken out
on motion.

THE REPLY.

Reply when to be put in, and what to contain.

When defendant may move for judgment upon an answer.

Demurrer to reply.

Plaintiffs' reply.

XLIV. When the answer shall contain new matter, the plaintiff may, within *twenty days*, reply to it, denying, generally or particularly, each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, matter not inconsistent with the complaint, in avoidance of the answer; or of any defence set up therein; or he may demur to the same for insufficiency, stating in his demurrer the grounds thereof. And the plaintiff may demur to one or more of several defences set up in the answer, and reply to the residue. 5

If the answer contain new matter, and plaintiff do not reply or demur.

XLV. If the answer contain a statement of new matter constituting a defence, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than *ten days*, for such judgment as he is entitled to upon such statement; and if the case require it, a writ of inquiry of damages may be issued. 15

Demurrer to reply.

XLVI. If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof. 20

GENERAL RULES OF PLEADING.

No pleading but complaint, answer, reply and demurrers.

Verification of pleadings.

How to state an account in pleading.

Pleadings to be liberally construed.

Irrelevant or redundant matter to be stricken out.

Judgments, how to be pleaded.

Conditions precedent, how to be pleaded.

Private statutes, how to be pleaded.

Libel and slander, how stated in complaint.

Answer in such cases.

In actions to recover property distrained for damage, answer need not set forth title.

What causes of action may be joined in the same action.

Allegation not denied; when to be deemed true.

Pleadings limited.

XLVII. No other pleading shall be allowed than the complaint, answer, reply and demurrers. 25

XLVIII. Every pleading in a Court of Record must be subscribed by the party or his attorney, and when any pleading in a case shall be verified by affidavit, all subsequent pleadings, except demurrers, shall be verified also in like manner; and in all cases of the verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true, and the grounds of such belief; and where a pleading is verified, it shall be by the affidavit of the party, unless he be absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney, or other person verifying the same. When the pleading is verified by the attorney, or any other person except the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; and when the Province, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts, except that in actions prosecuted by the Attorney General in behalf of the Province for the recovery of real property, the pleadings need not be verified.

Verification
of pleadings.

XLIX. It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged; but he shall deliver to the adverse party, within *ten days* after a demand thereof in writing, a copy of the account, verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The Court, or a Judge thereof, or a County Judge, may order a further or more particular bill.

Statement of
an account
in pleading.

L. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties.

Pleading
how construed.

LI. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the Court may require the pleading to be made definite and certain by amendment.

Redundant
matter.

Indefiniteness.

LII. In pleading a judgment or other determination of a Court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be

Pleading
judgments, &c

controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction.

Pleading performance of conditions precedent.

LIII. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally, that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance. 5

Pleading private statutes.

LVI. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute, by its title and the day of its passage, and the Court shall thereupon take judicial notice thereof. 10

Inuendo in actions for libel, &c.

LV. In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken. 15

Answers in cases of libel, &c.

LVI. In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances. 25

Title need not be set forth in case arising out of distraint.

LVII. In an action to recover the possession of property distrained doing damage, an answer that the defendant, or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property. 30 35

When several causes of action may be united.

LVIII. The plaintiff may unite several causes of action in the same complaint, where they all arise out of—

1. Contract, express or implied; or,
2. Injuries, with or without force, to the person; or,
3. Injuries, with or without force, to property; or injuries to character; or,
4. Claims to recover real property, with or without damages for withholding thereof, and the rents and profits of the same; or,

5. Claims to recover personal property, with or without damages for the withholding thereof; or,

6. Claims against a trustee, by virtue of a contract, or by operation of law.

7. But the causes of action, so united, must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated.

LIX. Every material allegation of the complaint, not specifically controverted by the answer, and every material allegation of new matter in the answer, not specifically controverted by the reply, shall, for the purposes of the action, be taken as true. But the allegation of new matter in a reply shall not in any respect conclude the defendant, who may on the trial countervail it by proofs, either in direct denial or by way of avoidance.

Allegations not controverted deemed true.

Exception.

MISTAKES IN PLEADING AND AMENDMENTS.

Material variances, how provided for.

Immaterial variances, how provided for.

What to be deemed a variance.

Amendments of course.

Amendments by the Court.

Amendment, after demurrer.

Suing a party by a fictitious name, when allowed.

No error or defect to be regarded, unless it affect substantial rights.

Supplemental complaint, answer and reply.

LX. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the Court, and in what respect he has been misled; and thereupon the Court may order the pleading to be amended, upon such terms as shall be just.

Material variances, how dealt with.

LXI. Where the variance is not material, as provided in the last section, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

Immaterial variances.

LXII. Where, however, the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a

When amounting to failure of proof.

case of variance within the last two sections, but a failure of proof.

One amend-
ment without
costs.

LXIII. Any pleading may be once amended by the party, of course, without costs, and without pre-⁵judice to the proceedings already had; at any time before the period for answering it shall expire, or within *twenty days* after the answer to such pleading shall be served. In such case, a copy of the amended pleading shall be served on the adverse party.

Amendments
upon terms,
&c.

LXIV. The Court may, at any time, in furtherance of ¹⁰justice, and on such terms as may be proper, amend any pleading or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by insert-¹⁵ing other allegations material to the case, or by conforming the pleading or proceeding to the facts proved. The Court may likewise, in its discretion, allow an answer or reply to be made, or other act to be done, after the time limited by this Act, or by an order enlarge such time, and may also, at any time within *one year* after notice ²⁰thereof, relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect; and may supply any omission, in any proceeding; and whenever any pro-²⁵ceeding taken by a party fails to conform in any respects to the provisions of this Act, the Court shall have power to permit an amendment of such proceeding, so as to make it conformable to law.

Amendments
after de-
murrer.

LXV. After the demurrer, either party may amend any pleading demurred to of course, and without costs, on ³⁰30 serving a copy of the same as amended, within *twenty days*, on the adverse party, who shall have *twenty days* to answer, reply, or demur thereto, if the pleading amended be a complaint, or answer, or to demur thereto if it be a reply; but a party shall not so amend more than once. ³⁵35 Upon the decision of a demurrer, the Court may, upon such terms as shall be just, allow any party to withdraw the same, and plead over.

When plaintiff
does not
know defend-
ant's name.

LXVI. When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any ⁴⁰40 pleading or proceeding by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

Errors not
affecting
substantial
rights to be
disregarded.

LXVII. The Court shall, in every stage of an action, ⁴⁵45 disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

LXVIII. The plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case, occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made.

Supplemental
complaint, &c.

LXIX. All causes and proceedings pending in the Court of Chancery at the time when this Act shall come into operation, shall be carried on and continued in the Court of Queen's Bench as if they had originally been instituted in that Court.

Causes now
pending in
Chancery.

LXX. The said Court shall, with all convenient speed after the passing of this Act, prepare a system of practice for the said Court in the spirit of this Act, and shall cause the same to be published for the general information of the public; and such system, not being repugnant hereto or to the laws of Upper Canada, shall have the like force and effect as if such system were embodied in this Act.

Court of Q.
B. to frame a
system of
practice.

COURTS OF CONCILIATION AND ARBITRATION.

LXXI. The Mayor, Town Reeve or other Chief Magistrate of every City, Town, Township and incorporated Village in Upper Canada, with any two or more of the Municipal Council thereof, shall form a Court of Conciliation for every such Municipality.

How com-
posed.

LXXII. The said Courts shall be held by the said Chief Magistrate, and any two Councillors whom he shall notify in rotation, to sit with him at least once in each month, and on a day to be fixed by a by-law of each Municipality for that purpose, and any Councillor neglecting to attend or to procure another to attend in his stead, on any day appointed for the sitting of such Court, as aforesaid, shall forfeit *twenty shillings*, to be recovered by warrant from the Chief Magistrate, as aforesaid.

When they
shall sit.

LXXIII. The causes of action of which this Court shall have cognizance, are Assault, Battery, False Imprisonment, Breach of Promise of Marriage, Libel, Slander, Malicious Prosecution, Personal Violence of any kind, and matters of unsettled account where the amount claimed shall not exceed *twenty pounds*.

Cases of
which they
shall take
cognizance.

LXXIV. Any person claiming to have a cause of action against another, in any of the cases before mentioned, may serve on him or her a written notice, mentioning the alleged cause of action, and requiring him or her to appear in relation thereto, before the Court of Concilia-

Party having
cause of
action to
summon the
other.

tion of the Municipality where the notice is served, at the next sitting of the Court, the time of which shall be named in the notice and shall not be less than five days from the time of service. Such notice may be served by any person capable of reading the same.

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Court to advise parties and endeavour to reconcile them.

LXXV. At the time specified in the notice, or at such other time as the hearing may be adjourned to by the Court, the parties appearing must be received by the Court, apart from all other persons, except that when an infant or a woman is a party to a proceeding before the Court, such infant or woman may be attended by the husband or guardian of such party, or if there be none, then by some friend approved of by the Court; and thereupon it shall be the duty of the Court to hear the allegations and explanations of the parties, to inform them of their respective rights, and to endeavor to reconcile their differences.

Parties may appear voluntarily.

LXXVI. Parties may voluntarily appear before the Court without notice, and such appearance shall be as effectual as if notice had been previously served.

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Memorandum if reconciliation be effected.

LXXVII. If a reconciliation be had, a memorandum thereof, stating the nature of the controversy or alleged cause of action, the appearance of the parties and the fact of the reconciliation, without specifying the terms thereof, unless it be agreed by the parties to specify them, must be entered in a book of record, to be kept by the Court, and such entry must be signed by the respective parties. The reconciliation thus effected shall be the final determination of the matter in controversy.

Parties may agree to a judgment.

LXXVIII. If the parties agree to a judgment in favor of one against the other in settlement of their differences, the Court may make, at the foot of the entry of reconciliation a memorandum, stating the judgment agreed upon. A transcript of such memorandum certified by the Clerk may be filed in the office of the Clerk of the County Court, and shall thereupon have the same effect, and may be enforced in the same manner as any judgment of such Court.

Or to abide the decision of the Court.

LXXIX. If instead of a reconciliation, the terms of which are settled between the parties, they voluntarily submit their matters in difference to the Court, and agree to abide the judgment, or assent thereto, in the presence of the Court, such submission and agreement or assent, must be entered in the book of record and signed by the respective parties; and thereupon the judgment of the Court, made pursuant to the submission, shall be filed and have the same effect, and may be enforced in the same manner as the judgment before mentioned.

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LXXX. If after the service of a notice as aforesaid, either party fail to appear, or if the parties, appearing, be not reconciled as before mentioned, or do not enter into the submission and agreement aforesaid, it shall be the duty of the Court to make an entry in their book of record, stating, in a summary manner, the nature of the charge, the notice given, the proof of service thereof, the failure to appear of either party, or the appearance of the parties and their failure to be reconciled.

If parties fail to attend, &c.

LXXXI. The entries in such book of record, or certified copies thereof signed by the Clerk of the Court, shall be evidence of the facts therein stated, and it shall be the duty of the said Clerk of the Court to give a transcript of the entries in any case, certified by him, to either party.

Entries made by the Court to be evidence.

LXXXII. In any action that may be thereafter brought for the recovery of damages for any cause of action aforesaid, the plaintiff cannot recover costs unless he produces at the trial the certified copy before mentioned, and unless it thereby appear that the notice was duly served, and that he or she appeared pursuant thereto, or that both parties appeared without notice; the defendant cannot recover costs in such action when it appears that after service of the notice he or she failed to appear pursuant thereto.

Party suing without first appearing before the Court, to recover costs.

LXXXIII. In an action between parties, or between principal and agent, if either party make it appear to the Court that, previous to his complaint or answer, he made an offer in writing to his adversary to submit the matter in difference between them to arbitration, no costs can be awarded against the party making such offer.

In certain cases offer to arbitrate must be made or no costs recovered.

LXXXIV. The Arbitrators must be three competent and disinterested persons, one to be chosen by each party, and the third to be either chosen by those two or by the Court of Conciliation of the Municipality where the notice was served or before whom the parties voluntarily appeared.

Who may be arbitrators.

LXXXV. In case either party shall be dissatisfied with any such award as aforesaid, an appeal shall lie to the County Warden and four Councillors; or to the Judge of the next Division Court that shall sit in or near such Municipality, at the option of the party appealing.

Appeal from award.

LXXXVI. No party to any admission or declaration made before the Court of Conciliation, shall be bound thereby or responsible therefor, in any other judicial proceeding whatever, except as provided in this Act. No statements made by parties before the said Court shall be used as evidence for or against them in any other place in case the Court fail to effect a settlement of their differences; the hearing of all matters submitted to the Court must be private and shall not be revealed by any member of the Court.

Admissions, &c. before Court, not to bind parties if no conciliation be effected.