the petitioner Molson, was not entitled to rank on the division sheet of the insolvent as a privileged creditor for the amount of the costs of a judgment recovered against the insolvent, upon which an execution had been issued, and placed in the hands of the sheriff of the county of Brant, against the goods of the insolvent, at the time of the making of the assignment by the insolvent to the official assignee.

It appeared from the judgment of the learned county court judge, that although he affirmed the award of the official assignee, yet in his opinion that award was bad in point of law, but that he felt himself bound to follow the judgment of the late Mr. Justice John Wilson in *In re Ross*, 3 P R. 394.

Miller, for the appellant.

Hugh McMahon (of London), for the assignee.

MORRISON, J., delivered the judgment of the court.

We have considered the case of *In re Ross*, 3 P. R. 394, and we are of opinion that the conclusion arrived at in that case cannot be upheld.

The 13th section of the statute 29 Vic ch. 18, (Insolvent Act of 1865) enacts that "no lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, unless such writ of execution shall have issued and been delivered to the sheriff at least thirty days before the execution of the deed of assignment, or the issue of a writ of attachment, under the said act; but this provision shall not apply to any writ of execution heretofore issued and delivered to the sheriff, nor affect any lien or privilege for costs which the plaintiff heretofore possessed under the law of that section of the province in which such writ shall have issued."

The expressions "lien or privilege" used in the section do not accurately or clearly define the intention of the legislature as applicable to this province. The word "privilege" is frequently used in the Lower Canada laws as referring to certain preferential or secured rights or claims, and in all probability that word was used in reference to that province, and the word lien as applicable to Upper Canada.

The expression lien is generally used to designate a right which a party has to retain that which is in his possession or power until certain demands are satisfied, and a particular lien may arise by mere operation of law. Now before the passing of the Insolvent Acts, an execution creditor, when he placed his writ in the sheriff's hands, had a particular lien on his debtor's property to the extent of his debt and costs. The Insolvent Act, by the 13th section above cited, deprived him of that lien for his judgment debt unless the execution had been delivered to the sheriff thirty days before the insolvency proceedings; but the section further provided that it should not apply to nor affect any lien or privilege for costs which the plaintiff possessed under the law of that part of the then province in which said writ was issued. The object of the section was to provide against judgments being a lien, and the costs thus referred to, we must take to be the costs of recovering the judgment; and as a lien for such costs did exist in Upper Canada before the passing of the act for the amount of those costs on the debtor's goods when the execution was placed in the sheriff's hands, it is only reasonable to assume and hold that the legislature meant and intended that such lien and the right to recover those costs in full, should not be affected by the provisions of the 13th section, but that the same should be secured to the judgment creditor as a privileged claim on the assets of the estate.

It is most likely that the legislature considered that as the execution creditor incurred these costs in prosecuting his claim to judgment and execution, he was entitled to a lien for them, otherwise he would be placed in a worse position than any other creditor.

During the argument we were referred to the case of *Converse et al* v. *Michie*, 16 C. P. 167, to the closing remarks of the learned Chief Justice of the court, where he says that the plaintiff "does not seem entitled to any lien for his costs." The effect of the decision in that respect, as stated by the learned judge of the county court of Wentworth, in *In re Scott, an insolvent*, to which we were referred, is, we think, correct,* namely, that what *Converse* v. *Michie* decided was, that in that case the property of the insolvent was vested in the assignee under the attachment of insolvency at the time the *fi. fa.* of the plaintiff issued, and that consequently there could be no lien for either debt or costs, and the question now under discussion could not arise.

On the whole, we are of opinion, that the order of the county court judge should be reversed, as well as the award of the official assignee, and that the petitioner Molson be allowed to rank as a privileged creditor for the amount of the costs in question on the estate of the insolvent; and as to the costs of this application, that they be paid out of the estate.

Appeal allowed.

UNITED STATES REPORTS.

FRIEDMAN v. RAILROAD CO.

The dying declaration of the deceased, as to the cause of the accident, is not evidence in an action for negligence.

Opinion by Hare, P. J., July 2, 1870.

This was an action brought by a widow and her children to recover damages for the death of her husband, who was fatally injured by the wheels of a passenger car belonging to the defendants. The plaintiff offered to prove the dying declaration of the deceased, that his death was due to the negligence of the conductor. This evidence was objected to and admitted under an exception. The point is now before us on a motion for a new trial.

A death-bed declaration is a statement made out of court and brought before the jury indirectly through the testimony of witnesses. It is therefore contrary to the rule which forbids hearsay evidence. The reason for this exception has been differently stated. The law, it has been said, presumes that a dying man can have no motive to falsify the truth, and standing in the shadow of another life does not need the sanction of an oath.

*This case has not been reported. A copy of the judgment was handed to the court during the argument. *In re Fair and Buist*, 2 U. C. L. J. N. S., 216, was also referred to.