



No. 167.

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1st. Session, 8th Parliament, 27th Victoria, 1863

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**BILL.**

An Act to improve the proceedings in Prohibition and Mandamus, in Upper Canada.

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September, 1863.

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1863.

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Mr. WOOD.

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QUEBEC:  
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An Act to improve the proceedings in Prohibition and on Writs of Mandamus, in Upper Canada.

**W**HEREAS the filing a Suggestion of Record on application for a Writ of Prohibition is productive of unnecessary expense, and the allegation of contempt in a declaration in Prohibition filed before Writ issued, is an unnecessary form; and it is expedient to make some better provision for payment of costs in cases of Prohibition: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1. It shall not be necessary to file a suggestion on any application for a Writ of Prohibition, but such application may be made on affidavit only; and in case the party applying shall be directed to declare in Prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not, as heretofore, on behalf of the party and of Her Majesty, and shall contain and set forth in a concise manner so much only of the proceeding in the Court below as may be necessary to shew the ground of the application, without alleging the delivery of a writ or any contempt, and shall conclude by praying that a Writ of Prohibition may issue: to which declaration the party defendant may demur, or plead such matters, by way of traverse or otherwise, as may be proper to shew that the Writ ought not to issue, and conclude by praying that such writ may not issue; and judgment shall be given, that the Writ of Prohibition do or do not issue, as justice may require, and the party in whose favor judgment shall be given, whether on Non-suit, Verdict, Demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same; and in case a verdict shall be given for the party plaintiff in such declaration, it shall be lawful for the Jury to assess damages, for which judgment shall also be given, but such assessment shall not be necessary to entitle the plaintiff to costs.
- Application for prohibition may be made on affidavit only.  
If the applicant be directed to declare before the writ issues.  
Proceedings.  
Judgment.  
Damages.  
Costs.
2. And whereas the provisions contained in a certain Act of Parliament passed in the Ninth year of the Reign of Queen Anne, intituled “An Act for rendering the Proceedings upon Writs of Mandamus and Information in a nature of *Quo Warrento* more speedy and effectual, and for the more easy trying and determining the rights of Offices and Franchises in Corporations and Boroughs,” relating to the Writs of Mandamus therein mentioned, have been found useful and convenient, and the same ought to be extended to the proceedings on other such writs; it is therefore enacted, that the several enactments contained in the said Statute relating to the Return of Writs of Mandamus, and the proceedings on such returns, and to the recovery of damages and costs, shall be and the same are hereby extended and made applicable to all other Writs of Mandamus, and the proceedings thereon, except so far only as the same may be varied or altered by this Act.
- Act of 9 Queen Anne cited.  
Its provisions extended to all other Writs of Mandamus.

Recital of the said Act of 9 Anne.

3. And whereas Writs of Mandamus, other than such that relate to the offices mentioned in or provided for by the said Act made in the ninth year of the Reign of Queen Anne, are sometimes issued to officers and other persons, commanding them to admit to offices, or do or perform other matters, in respect whereof the persons to whom such writs are directed claim no right or interest, or whose functions are merely ministerial in relation to such offices or matters; and it may be proper that such officers and persons should in certain cases be protected against the payment of damages or costs to which they may otherwise become liable; it is therefore enacted, that it shall be lawful for the Court to which application may be made for any Writ of Mandamus (other than such as relate to the said offices mentioned in or provided for by the said Act made in the Reign of Queen Anne), if such Court shall see fit so to do, to make Rules and Orders, calling, not only upon the person to whom such writ may be required to issue, but also all and every other person having or claiming any right or interest in or to the matter of such writ, to shew cause against the issuing of such writ and payment of costs of the application; and upon the appearance of such other person in compliance with such Rules, or in default of appearance after service thereof, to exercise all such powers and authorities, and make all such rules and orders, applicable to the case, as are or may be given or mentioned by or in any Act of Parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims: Provided always, that the Return to be made to any such Writ, and Issues joined in fact or in Law upon any Traverse thereof, or upon any Demurrer, shall be made and joined by and in the name of the person to whom such writ shall be directed; but nevertheless the same shall and may, if the Court shall think fit so to direct, be expressed to be made and joined on the behalf of such other person as may be mentioned in such rules: and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings at his own expense; and in such case if any judgment shall be given for or against the party suing such writ, such judgment shall be given against or for the person or persons on whose behalf the Return shall be expressed to be made, and who shall have the like remedy for the recovery of costs and enforcing the judgment as the person to whom the writ shall have been directed might and would otherwise have had.

Court may make Rules and Orders, calling on all persons having interest in the matter of the writ, to show cause against its issuing, &c.

Proviso: as to form of Return of, and against Issues joined, on Demurrer, &c.

For or against whom judgment shall be given.

Costs.

Case of death resignation or removal, or person making the return,—provided for.

Costs to be in discretion of the Court.

Recital.

4. In case the return to any such writ shall, in pursuance of the authority given by this Act, be expressed to be made on behalf of any other person as aforesaid, the further proceedings on such writ shall not abate or be discontinued by the death or resignation of, or removal from office of the person having made such return, but the same shall and may be continued and carried on in the name of such person; and if a peremptory writ shall be awarded, the same shall and may be directed to any successor in office or right of such person.

5. And for making some further provision for the payment of costs on applications for Mandamus, it is enacted, that in all cases of application for any Writ of Mandamus whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the Court, and the Court is hereby authorized to order and direct by whom and to whom the same shall be paid.

6. And whereas it is expedient that parties interested in the issuing of or in the Proceedings upon Writs of Mandamus shall be enabled in certain cases to have the Judgments and Decisions of the Courts of

Queen's Bench and Common Pleas for Upper Canada respectively, in respect of the said writs and of the proceedings thereon, reviewed by the Court of Error and Appeal, if they shall so think fit, and that a certain mode of effecting the same shall be ordained and established:

5 And whereas no power or authority is now given to the person prosecuting a Writ of Mandamus to demur to the Returns to any such writ, so that the decision of the said Courts respectively as to the validity of such Return could be reviewed by the Court of Error and Appeal; for remedy whereof, it is enacted, that in all cases in which the person

10 prosecuting any such writ heretofore issued or hereafter to be issued shall wish or intend to object to the validity of any Return already made or hereafter to be made to the same, he shall do so by way of demurrer to the same, in such and the like manner as is now practised and used in the Courts hereinbefore mentioned respectively in

15 personal actions; and thereupon the said Writ and Return and the said Demurrer shall be entered upon record in the said Courts respectively, and such and the like further proceedings shall be thereupon had and taken as upon a demurrer to pleadings in personal actions in the said

20 Courts respectively; and the said Courts respectively shall thereupon adjudge either that the said Return is valid in Law, or that it is not valid in Law, or that the Writ of Mandamus is not valid in Law; and if they adjudge that the said writ is valid in Law, but that the Return thereto is not valid in Law, then and in every such case they

25 shall also by their said judgment award that a peremptory Mandamus shall issue in that behalf, and thereupon such peremptory Writ of Mandamus may be sued out and issued accordingly, at any time after four days from the signing of the said judgment; and it shall be lawful for the said Courts respectively, and they are hereby required, in and by

30 their said judgment to award costs to be paid to the party in whose favour they shall thereby decide, by the other party or parties.

Form of objections to Return.

Demurrer.

Proceedings thereon.

Judgment.

Peremptory Mandamus, if the Writ be good and the Return bad.

Costs.

7. Whenever any such judgment as is hereinbefore mentioned shall be given, or wherever issue in fact or law shall be joined upon any pleadings, and judgment shall be given thereon by any of the Courts

35 aforesaid, it shall be lawful for any party to the Record in any of such case, who shall think himself aggrieved by such judgment, to deliver to the Clerk of the Crown of the Court whence the Writ of Mandamus issued, a memorandum in writing entitled in the Court and matter and signed by the party or his attorney, alleging that there is error in Law

40 in the Record and proceedings, and thereupon all subsequent proceedings shall on the part of the Courts, officers and parties, be as nearly as may be the same and have the same effect as those required to be had and taken under the Act respecting the Court of Error and Appeal, where a party to a cause alleging error in Law, is desirous of appealing from the judgment of either of the said Superior Courts of

45 Common Law to the Court of Error and Appeal.

Appeal in error given to party aggrieved.

Proceedings thereon.

8. No action, suit, or any other proceeding shall be commenced or prosecuted against any person or persons whatsoever, for or by reason of anything done in obedience to any peremptory Writ of Mandamus

50 issued by any Court having authority to issue Writs of Mandamus.

Persons obeying Writs of Mandamus indemnified.

9. The said Court of Error and Appeal for Upper Canada may make, and is hereby directed to make, from time to time and as often as they shall see occasion, such rules of practice in reference to the proceedings hereinbefore authorized, and the amount of bail to be taken,

55 as the said Court may deem necessary to effectuate the intention of this Act in relation to the same respectively.

Court may make Rules of practice under this Act.

Prohibition  
may be issued  
by a Judge  
in term time.

**10.** And whereas a prohibition cannot at present be obtained in term time, and it is expedient in that respect to amend the Law, it is therefore enacted, that it shall be lawful for any Judge of any of Her Majesty's Superior Courts of Common Law at Toronto, as well in term time as in vacation, to hear and determine applications for writs of prohibition, and to make such rules or orders for the issuing of such writs as might have been made by the Court, and all such rules or orders so made by any such Judge shall have the same force and effect as rules of Court for such purposes now have, and such writs shall be issued by virtue of such rules or orders as well in term time as in vacation; provided always, that any rule or order made by any such Judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the Court, on application made thereto by any party dissatisfied with such rule or order. 5 10

Proviso: his  
order may be  
set aside by  
the Court.

Act limited  
to L. C.

**11.** This Act shall apply only to Upper Canada.