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DIARY FOR OCTOBER.

3. SUN ... 16*th Sunday after Trinity.*
2. Mon ... County Court and Surrogate Court Term com.
7. Sat .... County Court and Surrogate Court Term ends.
8. SUN ... 17*th Sunday after Trinity.*
9. Mon ... York and Peel Assizes.
15. SUN... 18*th Sunday after Trinity.*
18. Wed.... *St. Luke.*
22. SUN ... 19*th Sunday after Trinity.*
28. Sat. ... *St. Simon and St. Jude.*
29. SUN ... 20*th Sunday after Trinity.*
31. Tues... All Hallow Eve.

NOTICE.

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

Upper Canada Law Journal.

OCTOBER, 1865.

LAW BILLS OF THE SESSION.

Whatever may be said of the results of the sitting of the assembled wisdom of the land in a political way, with which, however, we have nothing to do, it cannot be denied that some very important measures affecting property and civil rights have been added to the Statute Book, during the session of Parliament that has just closed.

Of these acts the most prominent are the Registry Act, the Act for quieting titles to real estate, and the Act to amend the law of property and trusts. Of the first it is needless to say much; it has been before the profession and the public for a long time, and the alterations now effected in the law of registration of titles to real estate, have been fully considered and are known doubtless to most of our readers. Without spinning out at the accustomed length, the arguments in favor of registration generally, we are nevertheless glad to notice every step towards a complete and stringent carrying out of the system which prevails in this country with reference to titles. And in this connection we direct attention to the letter which appears in another place, as to the advisability of providing some means of supplying the link which is occasionally found wanting in a chain of title, owing to the want of registration of the title of heirs. It would be a difficult thing perhaps to manage, but a little discussion and thought may eliminate the necessary inspiration. A very important judgment has just been given in the Court of Queen's Bench, in *Robson* v. *Waddell*, which decides that the description of the addition of the subscribing witness in a memorial, was essential to the validity of the registration. There had been a foreshadowing of this decision, and greater caution has of late years obtained amongst conveyancers in consequence; but we rather think that under it, half the titles in the country would be found more or less defective, if the matter remained in that position; but this judgment remained in abeyance, and was not given until a remedy had been provided by the Legislature, which is done by section 78 of the late act, which reads as follows:

"No registration of any deed or other instrument heretofore made shall be deemed or adjudged void by reason of the name or names, residence or residences, addition or additions of the witness or witnesses to such deed or instrument being improperly given or described in the registered momorial thereof, or being either in part or altogether omitted from such memorial, or by reason of any clerical error or omission of a formal or technical character therein; and all registrations heretofore effected in separate registry books of unincorporated villages, are hereby confirmed when the law has been otherwise complied with, and such separate registry books shall be taken and held to form a part of the registry books of the municipality of which such unincorporated village forms a part: provided always, that this clause shall not affect any case or cases now proceeding in any of the courts of law or equity in Upper Canada."

The Registry Act, for all purposes which concern the profession in general, comes into force on the first day of January next.

The Act for quieting titles has already been referred to at length in this journal.* It now remains to be seen how it will work. Chancery men who have lately been complaining of the reduction of their fees, will have the consolation of knowing that the operation of this act is peculiarly within the precincts of their court. We publish a copy of this act, as well as the rules promulgated by the judges of the Court of Chancery under it. With these two acts in full working order, there should be no

* Page 114, *ante*.

reason for any difficulty in the transfer of landed interests in Upper Canada; and it is refreshing to see the premonitory symptoms of a "move" in property, under the genial influence of the bountiful harvest, with which a kind Providence has this year blessed us.

We have next a curious gathering of several excellent provisions under the head of "An act to amend the law of property and trusts in Upper Canada." The first four sections are placed under the head of "Leases," and are intended to restrict, in certain cases, the operation of the rule of law respecting licenses to do acts which without such license would create a forfeiture or give a right to re-enter, to the specific breach or the particular part of the property, &c., to which the permission or waiver is actually intended to extend. Sections 5 to 9 inclusive refer to the breach of covenants to insure against loss by fire. The act also provides for the release from a rent-charge on part of a hereditament charged. It permits a deed which is executed and attested in the ordinary manner, to be a valid execution of a power of appointment by deed, so far as such execution and attestation is concerned. It makes provisions respecting the sale of timber, &c., under a power of sale, and the sale of property charged with the payment of any debt, by a testator, &c. Section 19 enacts that any person shall have power to assign personal property, including chattels real, directly to himself and another or other persons or corporation, by the like means as he might assign the same to another. Section 20 provides a punishment for frauds on sales and mortgages. Powers of attorney in general, and powers of attorney executed by married women for the sale or conveyance of real estate to which she is entitled, or authorizing an attorney to bar dower, in particular, come in for their share of legislation; and the old difficulty of the death of the donor of the power, without the knowledge of the attorney, is removed. Sections 25 to 29 refer to the distribution of assets. Section 30 refers to limitation in intestacy, which does not come into force until 1st of January next. Section 31 enables any trustee, executor, or administrator, without the institution of a suit, to apply by petition, certified by counsel, to any Judge of the Court of Chancery, in chambers, for the opinion, advice, and direction of the Judge on any doubtful point connected with the management of the trust estate. By section 32, every deed or will creating a trust shall, without prejudice to the clauses actually contained in it, be deemed to contain the usual clause limiting the liability of trustees, which is set out at length. This discursive but most useful act winds up with a provision respecting the satisfaction of mortgages charged on lands as to which no direction is given by the will of the owner.

The act amending the Insolvent Act of 1864 was passed this session, and is given in full in another place, as well as some other enactments for which we make room, some of them in this number and some in the *Local Courts' Gazette*, namely, "An Act in reference to the qualification of Justices of the Peace," the origin of which was the decision of the Court of Queen's Bench in *Herbert qui tam* v. *Dowswell*, 24 U. C. Q. B. 427; "An act to regulate the costs of arbitration;" An act to extend the act to impose duties on bills and notes to all notes and bills of whatever amount;" "An act to amend the master and servants' act;" "An Act to declare valid certain sales of lands in Upper Canada;" "An act to repeal the fifth sub-section of the Attorney's act;" "An act to prevent County Judges acting as conveyancers;" and "An act amending the Division Courts, so far as relates to the establishment of new divisions," &c.

Aliens have by degrees been placed more upon a footing with native-born subjects, so far as property is concerned; and an act of this session gives them further privileges, by enacting that the real estate of any alien dying intestate shall descend and be transmitted as if the same had been the real estate of a natural-born or naturalised subject of the Queen.

The march of intelligence may be further noticed in the passage of the act for abolishing the punishment of death in certain cases. For few if any of the crimes mentioned in the act is the death penalty now inflicted. If it is inexpedient that the punishment provided by law should be awarded, why have such punishments in the statute books?—and this, irrespective of the graver question, whether the extreme penalty of death is in any case consonant with sound reasoning, or necessary for the prevention of those crimes for which it may

still be inflicted. A motion was made in the House of Assembly, when this bill was under discussion, to have executions conducted privately within the prison walls, but the motion was withdrawn. There has been much said lately by able men in England, as well in reference to conducting executions in private as to the abolition of the death penalty altogether, but no satisfactory conclusion appears as yet to have been arrived at on either point. Public opinion seems to be divided as to whether such a punishment answers the purposes intended in such a manner as to legitimatize the depriving a human being of the life which the Almighty has given him, a proceeding which can only be excused on the ground of absolute necessity. This is, however, too important a matter to enter into at present, and any change in the law would only be warranted after a full discussion and a thorough investigation of facts and statistics.

We have also an act to amend the act of the previous session, respecting short forms of mortgages.

Besides the enactments referred to, there are several acts of general interest, though not coming strictly within the definition of law bills, such as the act as to stamps on notes and bills, already referred to; an act to authorize the formation of co-operative associations; an act to provide more fully for the punishment of the crime of kidnapping; an act to secure to wives and children the benefit of assurances on the lives of their husbands and parents; an act for the further improvement of grammar schools; and finally, two acts which we are glad to notice, though not law bills at all, but designed for the special benefit of farmers generally—an act to prevent the spread of Canada thistles, and an act to provide for the protection of sheep from dogs, &c.

DUNKIN'S ACT.

We notice that in several localities in Upper Canada, county and township votes are about to be taken, with a view of introducing the prohibitory provisions of the Temperance Act of 1864, otherwise known as "Dunkin's Act." We have already alluded* to some of the general provisions of this Act, which are intended for the prevention of drunkenness and for the protection of the wives, families and property of habitual drunkards generally. These enactments are theoretically good, so far as they go. The difficulty, as we before suggested, will probably lie in the working of them. As to the provisions for local prohibition, we entertain strong doubts as to the possibility of preventing the sale of intoxicating liquors by any legislative enactment of this kind, and more particularly so in the present divided state of public opinion on the subject. One of the worst things that can happen to a country is familiarizing the minds of the inhabitants with a systematic violation of the laws. Nothing weakens the force of a law so much as the knowledge that it can be broken with impunity, in fact it may almost be asserted that it is better to have no law at all than one which can be easily evaded or which cannot be enforced.

The sin of intemperance, however, is general, and some assert on the increase, and any course which the majority of a community think will check the evil should be tried; but only as an experiment, for, as we have just remarked, "the cure may be worse than the disease." But the voice of the majority should prevail; not the opinion of a few well meaning but in some cases mistaken enthusiasts, who, fully impressed with the evils of intemperance, do not care to think of the consequences which may result from their hasty, one-ideaed attempts to suppress it, and are not sufficiently conversant with human nature or sufficiently liberal in their ideas to form a correct opinion as to whether such attempts are likely to be successful.

In what some people call "the good old days," drunkenness was not considered either criminal or disgraceful even amongst the more intelligent and educated classes of the community. By degrees, however, the enlightenment of christianity and cultivated intellect prevailed, until the drunkard has at length come to be generally considered as despicable and a disgrace to humanity. This feeling is, for the reasons already given, stronger as we ascend in the social scale; but it has not yet descended to those who compose the class most strongly imbued with the vice of intemperance. The public opinion which operates so beneficially upon the higher classes has but little effect upon those for whom a cure is principally required.

* 1 L. C. G. 36.

The conclusion which may be drawn from this is, that some means should be devised which would bring forcibly before the intemperate the disgrace which attaches to the name of a drunkard. We may ask, would not a law which would make intemperance disgraceful in the eyes of all, and make the habitual drunkard contemptible, and which would place him on a level with a dangerous idiot, have a more salutary effect in suppressing this vice than a prohibitory law which we do not at present think can or will be rigorously enforced. Try what would be the effect of depriving the person adjudged to be an habitual drunkard of the rights of citizenship. Deprive him of all power to contract debts or to do any legal act respecting his property (if he has any) or place it in the hands of a committee, and disable him from voting at Parliamentary and municipal elections.

There is, however, a class too low to be reached by any of these means, who would have to be punished in a more open way; in some way, the disgrace of which would be more patent to them—as, for instance, putting them in the stocks, or, as is done in some European countries, compel them to go through the street with a drunkard's badge on, or with the head showing through the top of a barrel, or by inflicting any other punishment which would render them ridiculous; and, if it is thought advisable, punish also in some such way the person convicted of giving liquor to the drunkard. We commend these remarks to those who are earnestly endeavoring, with often but scant assistance, to remedy a great social evil.

The case of the *Commercial Bank* v. *The Great Western Railway Company*, has been heard before the Privy Council in England, and the appeal been dismissed with costs. The rule therefore for a new trial obtained by the defendants, and against which the plaintiffs appealed, stands. The case will probably come on for trial at the next assizes at Kingston. This appeal, it is said, will cost the Commercial Bank the nice little sum of $10,000, or thereabouts.

We are sorry to chronicle the sudden death of Dr. Ham, of Whitby, a well known and respected member of the profession. He died on the 30th September, at the age of 51 years.

JUDGMENTS.

QUEEN'S BENCH.

Present:—Draper, C. J.; Hagarty, J.; Morrison, J.

Monday, September 25, 1865.

Robson v. *Waddell.*—*Held*, that under the old registry act the description of the addition of the subscribing witnesses in the memorial was essential to the validity of the registration. Rule absolute to enter verdict for plaintiff.

Wilson v. *Voght.* — Appeal dismissed with costs.

Randall v. *Burton.*—Judgment for defendant on demurrer, with leave to apply to a judge in Chambers for leave to amend.

Dundas v. *Johnston.*—Rule discharged.

Miller v. *McGill.*—Rule absolute to enter verdict for plaintiff.

Lossee v. *Murray.*—Judgment for demandant on demurrer.

Brown v. *Lewis* —Rule absolute for new trial on payment of costs.

Short v. *Permet.*—Appeal dismissed with costs.

Bowes v. *Clancy.*—Appeal dismissed with costs.

Craig v. *Great Western Railway Co* —Appeal allowed.

Briggs v. *Grand Trunk Railway Co* —Judgment for defendants on demurrer, with leave to to apply to amend.

Corporation of Longueuil v. *Cushman.*—Rule discharged.

Tucker et al. v. *Phillips* —Rule discharged.

The Queen v. *Joseph Cowan.*—Rule absolute for new trial.

Dickson v. *Crabb.*—Rule discharged.

Lawrie et al. v. *McCallum.*—Rule discharged.

Chater v. *McMahon.*—Appeal dismissed with costs.

Bates v. *Great Western Railway Co* —Judgment for defendants on demurrer, with leave to apply to a judge in Chambers for leave to amend.

In the matter of the Township of Hartley and the Township of Emily.—Rule absolute to quash by-laws with costs, there having been voting on a temperance by-law and no one presiding at the meeting.

In re Forrester and Township of Ross.—Rule discharged with costs.

In re Valentine and the County of Brace.—Proceedings stayed by Act of Parliament.

Stewart v. *Kay.*—Judgment for demandant.

D'Arcy v. *White.*—*Held*, that in an action of ejectment against two defendants, one of whom allowed judgment by default, a judgment and writ for costs against both is regular. Rule discharged with costs.

Hibbert v. *Scott.*—Rule discharged.

Moffatt v. *Barnard.*—Rule absolute to enter nonsuit.

Hodge v. *Barnard* —Rule absolute to enter nonsuit.

Blackburn v. *Stewart.*—Rule discharged.

Baby v. *Langlois.*—Rule discharged with costs.

Lowry et al v. *Lowry.*—Rule absolute for new trial on payment of costs.

Saturday, September 30, 1865.

Dowker v. *Canada Life Assurance Co.*—Rule absolute.

Reid v. *Miller.*—Rule discharged.

In the matter of Fanny Lett and the Commercial Bank of Canada.—Appeal allowed, and rule to be made absolute in the court below, costs to abide the event.

Widder v. *Buffalo and Lake Huron Railway Co.*—Rule absolute to set aside verdict without costs. Leave to appeal granted.

Ontario Bank v. *Muirhead.*—Rule absolute to set aside *fi. fa.* lands.

Ontario Bank v. *Kirby et al.*—Rule absolute to set aside *fi. fa.* lands.

COMMON PLEAS.

Present:—Richards, C. J.; Adam Wilson, J.; John Wilson, J.

Monday, September 25, 1865.

Becher v. *Woods.*—*Postea* for plaintiff for south half 15, and for defendant as to south half 14.

Provincial Insurance Co. v. *Watson.*—Rule refused.

Nolan v. *Coe.*—Rule discharged.

Kyle v. *The Buffalo and Lake Huron Railway Co.*—Rule absolute to enter verdict for defendant on the third count, and discharged as to residue without costs to either party on this rule, the parties agree in the meantime to reduce verdict.

Ogilvie v. *McRory.*—*Held*, that a judge at *nisi prius* has power under sec. 222 of C. L. P. A. to amend the record by addition of the parties, if amendment necessary to the determination of the real question in controversy between the parties. Rule discharged.

Turley v. *Williamson.*—Rule discharged.

Stephens v. *Berry.*—*Held*, that a bill drawn in Chicago upon a party in Canada, payable in New York requires a Canadian stamp. That a party availing himself of our law by placing double stamps on it must do so before action, and *quære*, should he not do so within a reasonable time after becoming a party to the bill? Rule to increase the damages discharged, and rule absolute to enter nonsuit.

Mc Callum v. *McKinnon.*—Judgment for plaintiff on demurrer, with leave to apply to a judge in Chambers to amend.

Fisher v. *Berry.*—Rule absolute for new trial without costs.

Leatherman v. *Trow.*—Rule absolute for new trial on payment of costs in three weeks.

Friel v. *Ferguson.*—*Held*, that a justice of the peace acting without jurisdiction, or in cases of excess of jurisdiction, is not entitled to notice of action. Rule discharged. Leave to appeal refused.

Pyper v. *McKay.*—Judgment for defendant on demurrer to fourth and fifth pleas.

Gilmore v. *Grand Trunk Railway Co.*—Appeal allowed and rule absolute to enter nonsuit in court below.

Harrington v. *Murray.*—Rule discharged without costs.

Canada Permanent Building Society v. *Harris.* Judgment for plaintiff on demurrer to plea.

Kerr v. *Kinsey*—Rule discharged.

Ontario Bank v. *Kirby*—Rule discharged with costs.

Glennie v. *Ross*—Rule discharged.

In re Wallace and the Corporation of Halton.—Rule absolute with costs.

Saturday, September, 30, 1865.

Corporation of Tarlow v. *Bogart.*—Upon plaintiffs consenting to a verdict for defendant on issues to 1st count, verdict to stand for plaintiffs for $20 on 2nd count and rule to be discharged.

Harrold v. *The Counties of Simcoe and Ontario.*—*Held*, that the corporations of the counties of Simcoe and Ontario are liable for the defective state of the bridge over "The Narrows," whereby plaintiff fell and sustained injuries. Rule discharged. Leave to appeal granted.

Diamond v. *McAnany.*—Unless plaintiff consent to reduce his verdict by $200 on 1st count of the declaration, with an order for full costs, rule to be absolute for new trial without costs.

Burns v. *Cox.*—Stands.

Bond v. *Bond.*—Plaintiff's rule absolute for a new assessment and for amendment of declaration by striking out third breach on payment of costs, and defendant's rule discharged with costs.

City Bank v. *Macdonald.*—Stands with a view to a settlement between the parties.

Kitchen v. *Murray.*—Rule discharged, with costs.

Crooks v. *Dickson.*—Rule discharged, with costs.

Smart v. *Miller.*—Stands.

In re David Lee et al.—Judgment declaring the rights of the parties, and upon filing an affidavit of service on Ann Barker an order to go to the real representative for partition or sale.

IN THE COURT OF QUEEN'S BENCH AND COURT OF COMMON PLEAS.

Regulæ Generales.

Trinity Term, 29th Victoriæ.

The Rules of Court, under the head of "New Trial List," numbers One, Two, Three, Four, Five, Six, Seven, Eight, Nine, Ten, Eleven and Twelve, passed in Michaelmas Term, 27th Victoriæ, shall be, from and after the first day of Michaelmas Term next, annulled, and the following Rules shall come into force and take effect upon and after the first day of Michaelmas Term next.

NEW TRIAL LIST.

1. The party who obtains any rule *nisi* for a new trial, or for entering a non-suit or a verdict, or for increasing or reducing a verdict on leave reserved, may, on or after the fourth day, inclusive, after the serving such rule, file the same, together with an affidavit of service, with the Clerk of the Court granting such rule.

2. The party served with any such rule may, (if the same has not been already filed by the party who obtained the same) on or after the fifth day after the granting of the rule, file the copy served, with an affidavit of the fact and time of such service, with the Clerk of the Court granting such rule

3. In case the party to whom any such rule is granted shall neglect or delay to draw up and serve the same, the opposite party may, on or after the third day after the granting such rule, and upon filing with the Clerk an affidavit that the rule has not been served, enter a *ne recipiatur* with such Clerk, after which the Clerk shall not receive or enter such rule in the book hereafter required to be kept by him, and such rule shall be deemed to be abandoned, and the opposite party may proceed as if no such rule had been moved for or granted.

4. The Clerk shall, immediately on the receipt of any rule or copy, under the first or second Rules, enter a memorandum thereof in a book to be kept for that purpose in the order in which the same shall be delivered to him, such memorandum to be according to the form following:—

——————*Term*, (year).

Plaintiff's Name.	Defend't's Name.	Descript'n of Rule.	When filed with the Clerk.	How disposed of.

5. On the first Saturday, the second Tuesday, and the second Friday of every Term, the Court of Queen's Bench, after going through the Bar to hear motions for rules *nisi* or motions of course, will hear the rules so entered, according to the order in which they stand, in preference to any other business; and on the first Friday, second Monday, and second Wednesday of every Term, the Court of Common Pleas will, after going through the Bar to hear motions for rules *nisi* or motions of course, hear the rules so entered according to the order in which they stand, in preference to any other business. The causes to be heard each day to be those on the list as it stands at the opening of the Court.

6. Each Court, in its discretion, will hear any rule so entered when both parties are present and prepared to proceed.

7. If, when a rule is called on in its proper order, the party who obtained the same does not appear to support it, and the opposite party attends and applies to have it discharged, such rule may be discharged accordingly.

8. If the party called upon to shew cause does not appear when the rule is called on in its proper order, the Court will hear the other side, *ex parte*, and dispose of the rule.

9. If neither party appear, the rule may, in the discretion of the Court, be treated as having lapsed, and be struck out of the Clerk's books.

10. In the absence of other business, the Courts may, in their discretion, hear Rules so entered on any other days during Term besides those mentioned in the fifth Rule, the parties to the Rule being present and desirous to proceed.

11. Each Court will, on sufficient ground shown upon affidavit, enlarge a Rule so entered to a subsequent day in the same Term, or to the following Term, and the Clerk shall alter the entry accordingly, and place the enlarged Rule at the foot of the list.

12. All Rules entered by the Clerk as aforesaid, which remain unheard at the end of any Term, shall be enlarged as of course, on filing a motion paper to that effect, to the following Term, and shall be forthwith re-entered in the Clerk's book, in the order in which they then stand, for hearing in the next ensuing Term.

13. The Court may, nevertheless, in any case, if it shall see fit so to do, make any special rule or order, or give any special direction upon or with respect to any such Rule, or the entering, taking out, or service thereof, or with respect to any supposed lapse or abandonment thereof or otherwise, as it might have done before the passing of these or the rescinded Rules.

Dated 9th September, A.D. 1865.

(Signed) Wm. H. Draper, *C. J.*
Wm. B. Richards, *C.J.C.P.*
John H. Hagarty, *J.Q.B.*
Jos. C. Morrison, *J.Q.B.*
Adam Wilson, *J.C.P.*
John Wilson, *J.C.P.*

ORDERS OF THE COURT OF CHANCERY UNDER ACT FOR QUIETING TITLES.

[September 19, 1865.]

1. Under the Act for quieting titles to real estate in Upper Canada, the petition for investigation of title shall not include two or more properties dependent on separate and distinct titles; but may include any number of lots or parcels belonging to the same person, and dependent on one and the same chain of title.

2. Where a petition is filed under the said Act, the Registrar is to deliver to the party filing the same a certificate of the filing thereof for registration in the proper county; and thereupon the petition is forthwith to be referred and delivered by the Registrar to such officer of the court or other referee as shall from time to time be designated by the court for that purpose.

3. Such officer or other referee is to be called the Referee of Titles.

4. The particulars necessary under the Act to support the petition are to be delivered by the petitioner or his solicitor to the referee of titles, and are to be forthwith examined and considered by him.

5. Where the application is under the second section of the Act, the referee of titles, on receiving the petition, is to attend the presiding Judge in Chambers with the same for directions as to proceeding therewith.

6. In any case under the first section of the Act, and in any case which the Judge authorizes to be proceeded with under the second section of the Act, if, on such examination as aforesaid, the referee finds the proof of title defective, he is to deliver or mail to the petitioner, or to his solicitor or agent, a memorandum of such finding.

7. When the referee finds that a good title is shown, he is to prepare the necessary advertisement for the Canada Gazette, and to endorse thereon a memorandum of the other newspaper or newspapers, if any, in which he thinks it proper to have the same inserted, and the number of insertions to be given thereto in the Gazette and other newspaper or newspapers, respectively.

8. Any notice of the application to be served or mailed under the fourteenth section of the Act is to be prepared in like manner; and directions are in like manner to be given as to the persons to be served with such notice, and as to the mode of serving the same.

9. The referee is, from time to time, to confer with one of the judges in respect of the matters before the referee, as there shall be occasion.

10. Where there is no contest, the attendance of the petitioner, or of any solicitor on his behalf, is not to be required on the examination of the title, except where, for any special reason, the referee directs such attendance.

11. But in case the petitioner is dissatisfied with any finding or direction of the referee, he may apply to him to review and alter the same, and is to be entitled to an appointment for discussing the same before the referee; and an appeal will lie to the court from any finding or direction which is then made.

12. When any person has shown himself entitled to a certificate or title, or a conveyance under the Act and has published and given all the notices required, the referee is to prepare the certificate of title, or conveyance, and is to sign the same at the foot or in the margin thereof; and is to attend one of the judges with the same, and with the deeds, evidence, and other papers before him, in reference thereto; and on the certificate or conveyance being signed by the judge, the referee is to transmit or deliver the same to the registrar, to be signed and registered by him; and the registrar is to deliver or transmit the same, when so signed and registered, to the petitioner, his solicitor, or agent, for registration in the proper county.

13. When a certificate of title or conveyance under the Act, has been granted, the referee may, without further order, deliver, on demand, to the party entitled thereto, or his solicitor, all deeds and other evidences of title, not including affidavits made, and evidence given in the matter of the title; and is to take his receipt therefor.

14. The fees of solicitors and counsel, and the fees payable by stamps, for proceedings under the said Act, are, respectively, to be the same under like proceedings in other cases.

15. The referee is, in lieu of all other fees, to be entitled to a fee of fifty cents for every deed in the chain of title, other than satisfied mortgages; and to a fee of $2 on the certificate of title, or the conveyance under the Act; and no further or other fee is to be payable to the referee in respect of any of the proceedings by or before him under the said Act, in an uncontested case.

16. In a contested case, the referee is, in addition, to be entitled in respect of the proceedings occasioned by the contest, to the same fees therefor as are payable to the Master or accountant, for the like proceedings in suits.

17. Petitions under the 35th section of the Act are to be filed and proceeded with in the same manner, as nearly as may be, as petitions for an indefeasible title; and the fees of officers, solicitors, and counsel, are to be the same as in respect of the like proceedings in suits.

ACTS OF LAST SESSION.

AN ACT FOR QUIETING TITLES TO REAL ESTATE IN UPPER CANADA.

[Assented to 18th September, 1865.]

Whereas it is expedient to give certainty to the title to real estates in Upper Canada, and to facilitate the proof thereof; and also to render the dealing with land more simple and economical: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—Any owner of an estate in fee simple in land in Upper Canada, or any trustee for the sale of the fee simple, shall be entitled to have his title judicially investigated and the validity thereof ascertained and declared; and he shall be so entitled whether he has the legal estate or not, and whether his title is subject or not to any charges or incumbrances.

2.—Any other person who has an estate or interest, legal or equitable, in or out of land in Upper Canada, may also apply for the investigation of his title and a declaration of the validity thereof; but it shall be in the discretion of the Judge by or before whom the proceedings are taken, to grant or refuse the application for the investigation; and such discretion may be invoked and exercised at any stage of the proceedings, and the decision of the Judge in exercising such discretion shall be subject to appeal like any other decision.

3.—The application shall be to the Court of Chancery or any Judge thereof, and may be by a short petition in the form given in the Schedule A.

4.—A certificate by the Registrar of the said Court, of the petition being filed, shall be registered in the Registry Office of the County in which the land lies, and this certificate may be in the form given in Shedule B.

5.—The application shall be supported by the following particulars:

(1.) The title deeds (if any) and evidences of title relating to the land that are in the possession or power of the applicant;

(2.) A certified copy of the memorials of all other registered instruments affecting the land, or of all since the last judicial certificate, if any under this Act, was given (as the case may be), up to the time of the registering of a certificate of the petition as provided for by Section four;

(3.) The certificate of the Registrar of the County in which the land lies, as to bills and proceedings in Chancery or in any County Court on its equity side, relating to the land, and of which a certificate has been registered in his office.

(4.) A concise statement of such facts as are necessary to make out the title, and which do not appear in the produced documents; but no abstract of produced documents shall be required, except on special grounds;

(5.) Proofs of any facts which are required to be proved in order to make out the title, and which are not established by the other produced documents, unless the Judge shall dispense with such proofs until a future stage of the investigation;

(6.) An affidavit or deposition by the person whose title is to be investigated and a certificate of one of his Counsel or Solicitors, to the

(7.) A Schedule of the particulars produced effect hereinafter respectively mentioned, unless the Judge sees fit, for some special reason, to dispense with the same respectively; under the preceding six sub-sections.

6.—The affidavit or deposition of the person whose title is to be investigated, shall state to the effect, that to the best of his knowledge and belief he is the owner of the estate or interest (whatever it is) which is claimed by the petition, subject only to the charges and incumbrances set forth in the petition or in the Schedule thereto, or that there is no charge of incumbrance affecting the land; that the deeds and evidences of title which he produces, and of which a list is contained in the Schedule produced under the preceding section, are all the title deeds and evidences of title relating to the land that are in his possession or power, and that he is not aware of the existence of any claim adverse to or inconsistent with his own to any part of the land or to any interest therein, or if he is aware of such adverse claim, he shall set forth every such adverse claim, and shall depose that he is not aware of any except what he sets forth; and the affidavit or deposition shall also set forth whether any one is in possession of the land, and under what claim, right or title; and shall state that to the best of the deponent's knowledge, information and belief, the said affidavit or deposition, and the other papers produced therewith, fully and fairly disclose all facts material to the title claimed by the petitioner, and all contracts and dealings which affect the same or any part thereof, or give any right as against the applicant.

7.—This affidavit or deposition may, in a proper case, be dispensed with, or may be made by some other person instead of the person whose title is to be investigated, or an affidavit or deposition as to part may be made by the one, and as to part by another, at the discretion of the Judge to whom the application is made; and in such case the affidavit shall be modified accordingly.

8.—The certificate of the Counsel or Solicitor shall state to the effect, that he has investigated the title and believes the party to be the owner of the estate which the petition claims in the land in question, subject only (if such be the case) to any charges or incumbrances that may be set forth in the Schedule to the petition (or that he so believes, subject to any condition, qualification or exemption to be set forth in the certificate), and that he has conferred with the deponent on the subject of the various matters set forth in the affidavit or deposition referred to in the preceding two sections, and believes the affidavit or deposition to be true.

9.—The Judge in investigating the title may receive and act upon any evidence that is now received by any of the Courts on a question of title; and any evidence which the practice of English Conveyancers authorizes to be received on an investigation of a title out of Court; or any other evidence, whether the same be or be not receivable or sufficient in point of strict law, or according to the practice of English Conveyancers, provided the same satisfies the Judge of the truth of the facts intended to be made out thereby.

10.—The proofs required may be by, or in the form of, affidavits or certificates; or may be given *viva voce;* or may be in any other manner or form that under the circumstances of the case is satisfactory to the Judge in regard to the matters to which the same relate.

11.—If the Judge is not satisfied with the evidence of title produced in the first instance, he shall give a reasonable opportunity of producing further evidence, or of removing defects in the evidence produced.

12.—Before giving a certificate or conveyance under this Act, the Judge shall direct to be published in the *Canada Gazette*, and if he sees fit in any other newspaper or newspapers, and in such form and for such period or periods as the Judge thinks expedient, a notice either of the application being made, or of the order or decision of the Judge thereon; and

the certificate of conveyance shall not be signed or executed until after the expiration of at least four weeks from the first publication of such notice, or such other period as the Judge may appoint.

13.—When the Judge is satisfied respecting the title, and considers that the certificate of title can safely be granted without any other notice of application than the published notice so required, he shall grant the certificate accordingly.

14.—In case of there appearing to exist any claim adverse to or inconsistent with that of the Petitioner to or in respect of any part of the land, the Judge shall direct such notice as he deems necessary to be mailed to or served on the adverse claimant, his solicitor, attorney, or agent.

15.—In all cases he may require from time to time any further publication to take place, or any other notice to be mailed or served, that he deems necessary before granting his certificate.

16.—Before a certificate of title is granted, satisfactory evidence shall be given by certificate, affidavit or otherwise, that all taxes, rates and assessments, for which the land is liable, have been paid, or that all except those for the current year have been paid.

17.—Every claim of title under this Act shall be presumed to be subject to the following exceptions and qualifications, unless the petition for investigation expressly alleges the contrary;

(1.) The reservations (if any) contained in the original grant from the Crown;

(2.) Any municipal charges, rates or assessments theretofore imposed for local improvements, and not yet due and payable;

(3.) Any title or lien which, by possession or improvement or other means, the owner or person interested in any adjoining land has acquired to or in respect of the land mentioned in the certificate;

(4.) Any lease or agreement for a lease, for a period yet to run, of not exceeding three years, where there is actual occupation under the same.

18.—But if the applicant desires the certificate to declare the title to be free from the said particulars, or any of them, his petition shall so state, and the investigation shall proceed accordingly.

19.—Any person having an adverse claim, or a claim not recognized in the applicant's petition, may at any time before the certificate of title is granted, file and serve on the applicant, his solicitor or agent, a short statement of his claim, which may be in the form set forth in Schedule C.

20.—This claim shall be verified by an affidavit to be filed therewith.

21.—In case of a contest, the Judge may either decide the question of title on the evidence before him, or may refer the same or any matter involved therein to the full Court, or to any mode of investigation which is usual in other cases, or which he may deem expedient, and may defer granting the certificate until afterwards, according as the circumstances of each case render just and expedient.

22.—The Judge may, at any stage of the cause, order security for costs to be given by the applicant for a certificate, or by any person making any adverse claim.

23.—The Judge may order costs either as between party and party, or as between solicitor and client, to be paid by or to any person, party to any proceeding under this Act, and may give directions as to the fund out of which any costs shall be paid.

24.—The Petitioner may by leave of the Judge withdraw his application at any time before final adjudication, or payment of all costs incurred in the investigation either by himself or by any adverse claimant.

25.—With a view of expediting investigations, and subject to any general orders in this behalf, the Judge, if he sees fit, may refer any petition presented under this Act to the Master or a Deputy Master or any other officer of the said Court, or to any Counsel named by the Judge, and in such case the referee shall proceed as the Judge himself should do under this Act, had the reference not been made, and shall have the same powers.

26.—The Judge may also refer any title to counsel named by the Judge, for a preliminary report or examination, and may call for the assistance of counsel in any other way and for any other purpose that may tend to the dispatch of business under this Act.

27.—The Judge may give one certificate of title, comprising all the land mentioned in the Petition, or may give separate certificates as to the title of separate parts of the land.

28.—The certificate of title may be in the form contained in Schedule D to this Act, and shall be under the seal of the Court, and shall be signed by one of the Judges and by the Registrar of the Court, and the same and the Schedule (if any) thereto, or a duplicate or counterpart of the same, shall be registered in full, both in the Court of Chancery and in the Books of the Registry Office of the County where the land lies, without any further proof thereof.

29.—A memorandum or certificate of the registration may be endorsed on the certificate of title or on any counterpart or certified copy thereof thus:—

"Registered in Chancery.——186—.—— Book——, Page——, A. G. Registrar.

Registered in the Registry Office for the County of——, Book——, Page——, (Date) ——Registrar," and a memorandum or certificate so signed shall be evidence of the registration mentioned therein.

30.—The certificate of title when so sealed, signed and registered, shall be conclusive at law and in equity, and the title therein mentioned shall be deemed absolute and indefeasible, from the day of the date of the certificate.

as regards Her Majesty and all persons whatever, subject only to any charges or incumbrances, exceptions or qualifications mentioned therein, or in the Schedule thereto, and shall be conclusive evidence that every application, notice, publication proceedings, consent and act whatsoever, which ought to have been made, given and done previously to the granting of the certificate, has been made, given and done by the proper parties.

31.—After a certificate of title is duly registered, a copy of a certificate, purporting to be signed and certified as such copy, by the Registrar in Chancery, or by the Registrar for the County in which the land lies, shall be admissible evidence of the certificate for all purposes whatsoever, without further evidence of such copy, and without accounting for the non-production of the certificate.

32.—In case of a Chancery sale, the Court of Chancery, if it thinks fit, may investigate the title with a view to granting an indefeasible title, and in that case, a conveyance executed to the purchaser under the seal of the Court, and purporting to be under the authority of this Act, shall have the same conclusive effect as a certificate.

33.—The conveyance may be in the form set forth in Schedule E to this Act.

34.—Where a decree is made for the specific performance of a contract for the sale of an estate, and it is part of the contract that the vendor shall have an indefeasible title, the Court shall make the like investigation, and the conveyance may be in the form set forth in the same Schedule E.

35.—In case any person domiciled in Upper Canada, or claiming any real estate in Upper Canada, desires to establish, not his title to some specific property, but generally that he is the legitimate child of his parents, or that the marriage of his father or mother, or of his grandfather and grandmother, was a valid marriage, or that his own marriage was a valid marriage, or that he is the heir or one of the co-heirs of any person deceased, or that he is the natural born subject of Her Majesty, he may, if the said Court thinks fit, have any of the said matters judicially investigated and declared.

36.—The application may be by a short petition stating the object of the application.

37. The petition shall be supported by an affidavit of the applicant verifying the statements of the petition, and stating further that his claim is not disputed or questioned by any person; or if his claim is to his knowledge disputed or questioned, he shall set forth the facts in relation to such dispute or question, and shall depose that he is not aware of any dispute or question, except what he has set forth, and he shall state in the affidavit such other facts as may satisfy the Court of the propriety of proceeding with the investigation.

38.—The investigation shall be made by the same judicial authority and in the same manner, and on the same evidence, and the same publication or other notice shall be required, and the same proceedings generally shall be had, and the certificate granted on such investigation shall be registered in the same way, and may be proved by the same evidence, as nearly as may be respectively, as in cases under the first section of this Act.

39.—This certificate when registered shall be conclusive and indefeasible in favor of the party on whose application the same was granted, and all persons claiming by, from, through or under him, and shall be *prim facie* evidence in favor of all other persons, and against all persons of the truth of the fact therein declared.

40.—A separate book shall be kept in Chancery for the registering of these and other certificates of title, and conveyances given under this Act, and the certificates and conveyances registered therein shall be numbered in order, and convenient indexes to the books shall be kept in such form as the Court from time to time directs.

41.—In case any person who, if not under disability, might have made any application, given any consent, or done any act, or been party to any proceeding under this Act, is a minor, an idiot or a lunatic, the guardian of the minor, or committee of the estate of the idiot or lunatic may make such application, give such consent, do such act and be party to such proceeding as such person might, if free from disability, have made, given, done or been party to, and shall otherwise represent such person for the purposes of this Act; and if the minor has no guardian, or the idiot or lunatic no committee of his estate, the Court or Judge may appoint a person with like power to act for the minor, idiot or lunatic; but a married woman shall, for the purposes of this Act, be deemed a feme-sole.

42.—After a certificate is granted in regard to any of the matters investigated under this Act, any party aggrieved thereby may, on petition, and after satisfactorily accounting for his delay, have the title or claim re-investigated on such terms as may be just.

43.—But no proceeding on such petition shall affect the title of any person who, in the meantime, and after the registration of the certificate, shall have acquired, by sale, mortgage or contract, for valuable consideration, any estate or interest in the land specified in the certificate of title; or (in case the certificate was under the thirty-fifth section of this Act) in any land or other property, the title to which was derived from, through or under the person named in the certificate, in the character which is thereby declared to belong to him.

44.—Proceedings under this Act shall not abate or be suspended by any death or transmission or charge of interest, but in any such event the Court or Judge may require notices to be given to persons becoming interested, or may make any order for discontinuing, or suspending, or carrying on the proceedings, or

otherwise in relation thereto, as under the circumstances may be just.

46.—No petition, order, affidavit, certificate registration or other proceeding under this Act shall be invalid by reason of any informality or technical irregularity therein, or of any mistake not affecting the substantial justice of the proceeding.

46.—An appeal shall lie from an order or decision of a Judge under this Act to the full Court, and from the full Court to the Court of Error and Appeals, as in the case of Orders, Decrees, Rules and Judgments, in suits.

47.—The foregoing provisions of this Act shall be so construed and carried out, as to facilitate, as much as possible, the obtaining of indefeasible titles by the owners of estates in land, through the simplest machinery, at the smallest expense, and in the shortest time, consistent with reasonable prudence in reference to the rights or claims of other persons.

48.—If in the course of any proceeding under this Act, any person acting either as principal or agent, shall, knowingly and with intent to deceive, make, or assist or join in or be privy to the making of any material false statement or representation, or suppress, conceal or assist or join in or be privy to the suppressing, withholding or concealing from the Court any material document, fact or matter of information, every person so acting shall be deemed to be guilty of a misdemeanor, and on conviction shall be liable to be imprisoned in the Provincial Penitentiary for a term not exceeding three years, and not less than two years, or to be imprisoned in any other prison or place of confinement for any term less than two years, and in the latter case with or without hard labor, or to fined such sum as the Court by which he is convicted shall award; any order or declaration of title obtained by means of such fraud or falsehood, shall be null and void for or against all persons other than a purchaser for valuable consideration without notice.

49.—If in the course of any proceeding before the Court, under this Act, any person shall fraudulently forge or alter, or assist in forging or altering any certificate or other document relating to such land or the title thereto, or shall fraudulently offer, utter, dispose of or put off any such certificate or other document, knowing the same to be forged or altered, such person shall be guilty of felony, and upon conviction shall be liable, at the discretion of the Court by which he is convicted, to be imprisoned in the Provincial Penitentiary for life or for any term not less than three years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years, and in the latter case with or without hard labor.

50.—No proceeding or conviction for any act hereby declared to be a misdemeanor, shall affect any remedy which any person aggrieved by such act may be entitled to, either at law or in equity, against the person who has committed such act.

51.—Nothing in this Act shall entitle any person to refuse to answer any question or interrogatory in any civil proceeding in any Court of law or equity, but no answer to any such question or interrogatory shall be admissible in evidence against such person in any civil proceeding.

52.—The said Court may, from time to time, make general orders for referring all or any applications under this Act, to any master, deputy-master or other officer of the Court, or to any Counsel or other person appointed by the Court in that behalf, and to regulate the fees to be paid on such reference, and the referee shall have the same powers as a Judge within the limits prescribed by such general orders; and the Court may also from time to time, make other general orders for the purposes of this Act, and for regulating the practice under the same; and all general orders made in pursuance of this section may from time to time be rescinded or altered by the said Court.

SCHEDULE A.

IN CHANCERY.

Form of Petition for the investigation, sec. 3.

In the matter of (*the East half of lot No.—— in the—— concession in the township of—— or as the case may be, describing the property very briefly.*)

To the Honorable the Judges of the Court of Chancery:—

The Petition of—— ——

Sheweth,—

That your petitioner is absolute owner in fee simple in possession (*or as the case may be*), of the following property (*describing it*).

That there is no charge or other incumbrance affecting your petitioner's title to the said land (*except, &c., or,—that your petitioner's title is subject only to the charges or incumbrances in the schedule hereto mentioned, and that the only persons having or claiming any charge, incumbrance, estate, right or interest in the said land are set forth in the schedule hereto annexed, and that the charge, incumbrance, estate, right or interest belonging to or claimed by each is therein set forth.*) Your petitioner therefore prays that his title to the said land may be investigated and declared under the Act for quieting titles to real estate in Upper Canada.

(Signed,) A. B.
or C. D., Solicitor for A. B.

SCHEDULE B.

Form of Registrar's Certificate of an Application under this Act, sec. 4.

I certify that an application has been made by —— to the Court of Chancery, under the Act for quieting titles to real estate in Upper

Canada, for a certificate of title to the following lands (*stating them*).

Alex. Grant,
Registrar.

SCHEDULE C.

Form of an Adverse Claimant's Statement, Sec. 19.

In the matter of, &c. (*as in petition*).

A. B. of, &c., claims to be the owner of the said land, &c., &c. (*stating very briefly the nature of the claim and the grounds of it*). Dated this —— day of —— 186—.

(Signed,) A. B.,
or C. D., Solicitor for A. B.

SCHEDULE D.

Form of Chancery Certificate of Title, sec. 28.

No. ——

These are to certify under the authority of the Act for quieting titles to real estate in Upper Canada, that A. B. —— is the legal and beneficial owner in fee simple in possession (*or as the case may be,*) of all, &c., (*here describe the property,*) subject to the reservations mentioned in the seventeenth section of the said Act and therein numbered respectively one, two, three and four (*or as the case may be*), and to (*specifying either by reference to a schedule or otherwise any of the other charges or incumbrances, exceptions, or qualifications to which the title of A. B. is subject*) but free from all other rights, interests, claims and demands whatever. Or that (*stating the facts found and declared under the thirty-fifth section of this Act, and stating on whose application the same are declared.*)

In witness whereof —— (*Chancellor or one of the Vice-Chancellors,*) of the said court, has hereunto set his hand, and the seal of the said court has been hereunto affixed, this —— day of ——.

A. Grant, C. D. L. S.
Registrar.

SCHEDULE E.

Form of Chancery Deed, secs. 33 *and* 34.

No. ——

The Court of Chancery for Upper Canada, under the authority of the Act for quieting titles to real estate in Upper Canada, doth hereby grant unto A. B. &c. (*here describe the premises sold*), to hold the same unto the said —— his heirs and assigns for ever (*or as the case may be*), subject to (*here specify as in the case of a Chancery certificate of title*).

In witness whereof —— (*Chancellor or one of the Vice-Chancellors of the said Court*), has hereunto set his hand, and the seal of the said court has been set, this —— day of —— in the year of our Lord, ——

A. Grant, C. D. L. S.
Registrar.

An Act to amend the Insolvent Act of 1864.

[Assented to 18th September, 1865.]

Whereas, it is expedient to amend the Insolvent Act of 1864, in the particulars hereinafter set forth; Therefore, Her Majesty, by and with, &c., enacts as follows:

1.—Every Assignee appointed under a Deed of Assignment shall immediately give notice thereof by advertisement. (Form D, appended to the said Act.)

2.—A voluntary assignment may be made to any official assignee appointed under the said Act, without the performance of any of the formalities, or the publication of any of the notices required by subsections one, two, three and four of section two of the said Act.

3. The following shall be added to, and shall be read and construed as forming part of subsection *a* of section three, that is to say: "or if, being a trader, he permits any execution issued against him under which any of his chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within forty-eight hours of the time fixed by the Sheriff or officer for the sale thereof; subject however to the privileged claim of the seizing creditor of the costs of such execution, and also to his claim for the costs of the judgment under which such execution has issued; which shall constitute a lien upon the effects seized, or shall not do so, according to the law as it existed previous to the passing of this Act, in the section of this Province in which the execution shall issue."

4.—In Upper Canada, if the defendant, in any process for compulsory liquidation, absconds from the Province, or remains without the Province, or conceals himself within the Province, service of the Writ of Attachment issued against him under the said Act, may be validly made upon him in any manner which the Judge may order, upon application to him in that behalf.

5.—If the Sheriff or officer charged with any writ of attachment, is unable to obtain access to the interior of the house, store, or other premises of the defendant named in such writ, by reason of the same being locked, barred or fastened, such Sheriff or officer shall have the right forcibly to open the same.

6.—In proceedings for compulsory liquidation, concurrent Writs of Attachment may be issued, if required by the plaintiff, addressed to the Sheriffs of districts or counties other than that in which such proceedings are being carried on.

7.—No declaration shall hereafter be required in proceedings for compulsory liquidation, and such proceedings shall not be contested either as to form or upon the merits, otherwise than by summary petition, as provided by sub-section twelve of section three of the said Act.

8.—Writs of attachment in proceedings for compulsory liquidation may be made returnable after the expiry of five days from the ser-

vice thereof, where the defendant resides in this Province, and not more than fifteen miles from the place of return; and one additional day for every additional distance of fifteen miles between such residence, if in this Province, and such place of return.

9.—The guardian appointed under a writ of attachment shall have the right in his own name, and in his capacity as such guardian—but only after having obtained an order of the Judge to that effect, upon cause shewn, to institute any conservatory process that may be necessary for the protection of the estate.

10.—If, pending proceedings for compulsory liquidation, the insolvent should make a voluntary assignment of his estate and effects, in conformity with the provisions of the said Insolvent Act of 1864 and of this Act, the assignee under such assignment may apply for and obtain from the Judge an order to stay such proceedings, subject to the claim of the plaintiff for payment, out of the estate, of the costs incurred in such proceedings.

11.—If a writ of attachment issue against any trader, by reason of the neglect of such trader to satisfy a writ of execution against him as hereinbefore provided, and such trader shall petition to set aside such writ of attachment, it shall be sufficient for him to shew upon such petition that such neglect was caused by a temporary embarrassment, and that it was not caused by any fraud or fraudulent intent, or by the insufficiency of the assets of such trader to meet his liabilities.

12.—The operation of the seventh sub-section of section two, and of the twenty-second sub-section of section three of the said Act, shall extend to all the assets of the insolvent, of every kind and description, although they are actually under seizure under any ordinary writ of attachment, or under any writ of execution, so long as they are not actually sold by the Sheriff or Sheriff's officer under such writ. This clause shall not apply to any writ of execution now in the hands of the Sheriff. But the rights, liens and privileges of the seizing or attaching creditor, for his costs upon any such writ, shall be the same as they were previous to the passing of this Act, in the section of this Province in which such writ shall issue.

13.—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, or by levying upon or seizing under such writ, the effects or estate of the insolvent; unless such writ of execution shall have issued and been delivered to the Sheriff at least thirty days before the execution of a 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.

14.—The preferential lien of the landlord for rent in Upper Canada, is restricted to the arrears of rent due during the period of one year last previous to the execution of a deed of assignment, or the issue of a writ of attachment under the said Act as the case may be, and from thence, so long as the assignee shall retain the premises leased.

15.—The right of appeal granted by sub-section two of section seven of the said Act is hereby extended, and shall apply to any order of a Judge made upon any of the matters or things upon which he is authorized to adjudicate or to make any order by the said Act, or by this Act. And the delay for applying for the allowance of an appeal is hereby extended to eight days; and the provisions of the seventh sub-section of the seventh section of the said Act are hereby extended to all judgments and orders of a Judge which are rendered in Lower Canada under the said Act, or under this Act.

16.—No attachment, or seizure or sale under execution, of any of the estate or effects of an insolvent shall be issued, made or proceeded with, after an Assignee has been appointed under a Deed of Assignment, or liquidation, as the case may be. But all rights and remedies which might otherwise require to be enforced by such attachment, seizure or sale, shall be enforced by the Judge upon summary petition duly signified to the assignee and to parties interested, and by the assignee under the order of the Judge to be made thereon.

17.—If at the time of the issue of a writ of attachment or the execution of a deed of assignment, any immovable property or real estate of the insolvent be under seizure, or in process of sale, under any writ of execution or other order of any competent court, such sale shall be proceeded with by the officer charged with the same—unless stayed by order of the Judge upon application by the guardian or assignee and upon special cause shewn, and after notice to the Plaintiff, reserving to the party prosecuting the sale, his privileged claim on the proceeds of any subsequent sale, for such costs as he would have been entitled to be paid by privilege, out of the proceeds of the sale of such property, if made by such officer. But if such sale be proceeded with, the moneys levied therefrom shall be paid over to the assignee for distribution according to the rank and priority of the claimants thereon, and the officer charged with the execution shall make his return accordingly.

18.—Upon a secured claim being filed, with a valuation of the security, it shall be the duty of the assignee to procure the authority of the creditors at their first meeting thereafter, to consent to the retention of the security by the creditor, or to require from him an assignment, and delivery thereof. And if any meeting of creditors take place without deciding upon the course to be adopted in respect of such secur-

ity, the assignee shall act in the premises according to his discretion, and without delay.

19.—If the security consist of a mortgage upon real estate, or upon ships or shipping, the property mortgaged shall only be assigned and delivered to the creditor, subject to all previous mortgages, *hypothèques*, and liens thereon, holding rank and priority before his claims; and upon his assuming and binding himself to pay all such previous mortgages, *hypothèques*, and liens,—and upon his securing previous charges upon the property mortgaged in the same manner, and to the same extent as the same previously secured thereon; and thereafter the holders of such previous mortgages, *hypothèques*, and liens shall have no further recourse or claim upon the estate of the insolvent.

20.—In any contestation in insolvency being proceeded with before an assignee, the assignee may issue subpœnas requiring the attendance of witnesses, and the production of documents by such witnesses—in the same manner as such subpœnas may be issued by the ordinary courts of law—and any witness so summoned may be punished for disobedience to any such subpœna, by the Judge, upon summary petition, in the same manner as any witness may be punished for disobedience to a subpœna issued from the court in which the Judge has jurisdiction.

21.—If for any purpose it becomes necessary to ascertain the proportion of the creditors of an insolvent who have voted at any meeting or concurred in any act or document; and if it be found that the whole of the creditors holding claims against an insolvent for sums of one hundred dollars and upwards do not represent the proportion in value of the liabilities of the insolvent subject to be computed in that behalf and required to give validity to such vote, act or document, such proportion may be completed by the votes or concurrence of creditors holding claims of less than one hundred dollars each.

22.—In the nomination of an assignee, in the granting of an allowance to the insolvent, in the execution of a deed of composition and discharge, in the consent to a discharge, and in every other matter wherein the right of a creditor to vote or act depends upon the amount of his claim, every creditor whose claim amounts to or exceeds one hundred dollars shall have such right; subject always to the provisions of the said Act respecting the voting and action of secured creditors; and the proportions of creditors so voting or concurring shall be ascertained by computing all claims entitled so to vote or act.

23.—Nothing in the said Act contained shall invalidate payment made by a debtor of the insolvent to the insolvent within one week after the execution of a deed of assignment or of the issue of a writ of attachment, in good faith, and in ignorance of the insolvency of his creditor.

24.—The statute of set-off shall apply to all claims in insolvency and also to all suits instituted by an assignee for the recovery of debts due to the insolvent in the same manner and to the same extent as if the insolvent were himself plaintiff or defendant as the case may be, except in so far as any claim for set-off shall be affected by section eight of the Insolvent Act of 1864, treating of fraud and fraudulent preference.

25.—Any affidavit requiring to be sworn in proceedings in insolvency may be sworn before any Commissioner for taking affidavits appointed by any of the Courts of Law or Equity in this Province.

26.—The forms A, H, K, N, O and Q to this Act appended are substituted for and shall be used respectively instead of the forms A, H, K, N, O and Q appended to the said Act, and the publication thereof in the *Canada Gazette* may be restricted to one language in the discretion of the person causing such advertisement to be published; and in publishing any notice required by the said Act, the form whereof is not given therein, such will be sufficient, as shall intelligibly express the purport of such notice.

27.—The provisions of the said Act shall apply to the heirs, administrators or other legal representatives of any deceased person who, if living, would be subject to its provisions; but only in their capacity as such heirs, administrators or representatives, without their being held to be liable for the debts of the deceased to any greater extent, than they would have been, if the said Act and this Act had not been passed.

28.—If any creditor of an insolvent, directly or indirectly takes or receives from such insolvent any payment, gift, gratuity or preference or any promise of payment, gift, gratuity or preference, as a consideration or inducement to consent to the discharge of such insolvent, or to execute a deed of composition and discharge with him; such creditor shall forfeit and pay a sum equal to treble the value of the payment, gift, gratuity or preference so taken, received or promised; and the same shall be recoverable by the assignee for the benefit of the estate, by suit in any competent court, and when recovered shall be distributed as part of the ordinary assets of the estate.

29.—If, after the issue of a writ of attachment in insolvency, or the execution of a deed of assignment, as the case may be, the insolvent retains or receives any portion of his estate or effects, or of his moneys, securities for money, business papers, documents, books of account, or evidences of the debt, or any sum or sums of money, belonging or due to him, and retains and withholds from his assignee, without lawful right, such portion of his estate or effects of his moneys, securities for money, business papers, documents, books of account, evidences of debt, sum or sums of money, the assignee may make application to the Judge by summary petition, and after due

notice to insolvent, for an order for the delivery over to him of the effects, documents or moneys, so retained; and in default of such delivery in conformity with any order to be made by the Judge, upon such application, such insolvent may be imprisoned in the common gaol, for such time, not exceeding one year, as such Judge may order.

30.—Whenever, under the said Act, a meeting of creditors cannot be held, or an application made until the expiration of a delay named therein, the notices of such meeting or application may be given pending such delay.

FORM A.

Insolvent Act of 1864

The Creditors of the undersigned are notified to meet at——, in——on——, the——day of——at——o'clock,——, to receive statements of his affairs, and to name an Assignee. (*Domicile of debtor and date.*)

(*Signature*).

The following to be added to notices sent by Post:

The Creditors holding direct claims and indirect claims, maturing before the meeting, for one hundred dollars each and upwards, are as follows: (*names of Creditors and amounts due*) and the aggregate of claims under one hundred dollars, is——. (*Domicile of Debtor and date.*) (*Signature*).

FORM H.

Insolvent Act of 1864.

A. B., Plaintiff.

C. D., Defendant.

A Writ of Attachment has issued in this cause.

(*Place. Date.*) (*Signature*).

Sheriff.

FORM K.

Insolvent Act of 1864.

In matter of A. B. (*or* A. B. & Co.), an insolvent.

The undersigned has been appointed Assignee, in this matter, and requires claims to be filed within two months from this date.

(*Place. Date.*) (*Signature*).

Assignee.

FORM N.

Insolvent Act of 1864.

In matter of A. B. (*or* A. B. & Co.), an insolvent.

A dividend sheet has been prepared, subject to objection until the——day of——, (*Date*).

Assignee.

FORM O.

Insolvent Act of 1864.

Province of Canada, District (*or* County) of ——

In the (*name of Court.*)

In the matter of A. B. (*or* A. B. & Co.), an insolvent.

The undersigned has filed a consent by his creditors to his discharge (*or* a deed of composition and discharge, executed by his Creditors), and on——the——day of——next, he will apply to the said court *or* to the Judge of the said Court, (*as the case may be*) for a confirmation thereof.

(*Place. Date.*)

(Signature of Insolvent, or of his Attorney *ad litem.*)

FORM Q.

Insolvent Act of 1864.

Province of Canada, District (*or* County) of ——

In the (*name of Court*).

In the matter of A. B. (*or* A. B. & Co.), an insolvent.

On——the——day of——next, the undersigned will apply to the said Court *or* the Judge of the said Court, (*as the case may be*) for a discharge under the said Act.

(*Place. Date.*)

(Signature of the Insolvent, or his Attorney *ad litem.*)

An Act to amend the Act respecting Attorneys.

[Assented to 18th September, 1865.]

Whereas by the Act passed in the twenty-eighth year of Her Majesty's Reign, chaptered twenty-one, and intituled "An Act to amend the Act respecting Attorneys," the fourth sub-section of the third section of chapter thirty-five of the Consolidated Statutes for Upper Canada, was repealed, and a new fourth sub-section was substituted in lieu thereof; and whereas the fifth sub-section of the third section of the said chapter thirty-five conflicts with the said substituted sub-section, and it is desirable that the same should be repealed; Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—The fifth sub-section of the third section of chapter thirty-five of the Consolidated Statutes for Upper Canada shall be and the same is hereby repealed.

An Act to amend the Act intituled "An Act respecting County Courts."

[Assented to 18th September, 1865.]

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

1.—The fifth section of the fifteenth chapter of the Consolidated Statutes for Upper Canada is hereby amended and extended by the addition of the words, "or as a conveyancer, or do any manner of conveyancing, or

"prepare any papers or documents to be used "in any Court of this Province," which words are hereby incorporated in that section, and shall be read as a part thereof immediately after the word "Public," in such section.

An Act to declare valid certain Sales of Lands in Upper Canada.

[Assented to 18th September, 1865.]

Whereas, by an Act passed in the Session of Parliament held in the thirteenth and fourteenth years of Her Majesty's Reign, chapter sixty-seven, intituled: "*An Act to establish a more equal and just system of Assessment in the several Townships, Villages, Towns, and Cities in Upper Canada,*" it was amongst other things enacted that certain lands upon which any taxes should remain unpaid on the 1st day of January, one thousand eight hundred and fifty-one, or so much thereof as should be sufficient to discharge such taxes, with interest and costs, should be sold by the Sheriff or High Bailiff in manner in and by the said Act particularly mentioned and set forth. And whereas, it was further provided by the said Act, that the owner of any such lands so sold as aforesaid, might redeem the same within three years from day of sale, and in case the same should not be so redeemed within that period, then that the Sheriff or High Bailiff, at any time after the expiration of that period, should execute and deliver a deed of sale of such land to the purchaser, his heirs and assigns.

And whereas, under the provisions of the said Act, various lands, upon which taxes were unpaid as aforesaid, were in the year one thousand eight hundred and fifty-two, sold by various Sheriffs of Counties in Upper Canada; which lands were never redeemed by the owners, according to the provisions of the said Act.

And whereas, after such sales were made, and before the said period for the redemption thereof had expired, that is to say, on the fourteenth day of June, one thousand eight hundred and fifty-three, a certain other Act was passed (sixteenth Victoria, chapter one hundred and eighty-two), which took effect on the first day of January, one thousand eight hundred and fifty-four, whereby the said first-mentioned Act (thirteenth and fourteenth Victoria, chapter sixty-seven), was repealed, and no provision was made thereby for completing the sales made under the authority of the said first-mentioned Act.

And whereas, in many cases, the lands sold under the said first-mentioned Act have never been redeemed, and the purchasers thereof have obtained deeds thereof from the respective Sheriffs, and gone into possession thereof, and made valuable improvements thereon.

And whereas, it has been decided and adjudged that by reason of the repeal of the first-mentioned Act, before the expiration of the period allowed for the redemption of such lands, and before the execution by the Sheriff to the purchaser, of a deed of the same, the title of such purchaser is defective, and unless a remedy be provided much loss and injury will be sustained by innocent purchasers; and it is expedient to provide a remedy in that behalf.

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

1.—In all cases where lands were legally sold for taxes under the authority of the said first-mentioned Act, and not redeemed within the period by that Act limited in that behalf, and the purchaser or those claiming under him shall have gone into actual possession, such sales shall be and are hereby declared legal and binding upon all parties concerned, and all deeds executed or that may be executed by the Sheriff for conveying such lands to the respective purchasers thereof, shall be held to be legal and valid, anything in the said statute secondly hereinbefore-mentioned or any other statute or law to the contrary notwithstanding.

2.—In all cases where the purchaser at such sales, or those claiming under him shall not have gone into actual possession of the lands sold, the owner of such last-mentioned land may redeem the same within one year from the passing of this Act by paying the amount of the taxes for which the lands were sold and the costs of the sale, and ten per cent. interest thereon, together with all taxes that may have been paid by the purchaser or his assigns, and ten per cent. interest thereon—and in default thereof such last-mentioned sales are hereby declared to be legal and binding upon all parties concerned, and all deeds executed or that may be executed by the Sheriff for conveying such last mentioned lands to the respective purchasers thereof shall be held to be legal and valid.

An Act to regulate the Costs of Arbitrations in Upper Canada.

[Assented to 18th September, 1865.]

For restraint of unreasonable charges attending Arbitrations; Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada enacts as follows:

1.—No arbitrator who is not by profession and calling a barrister, attorney, engineer, architect, or deputy provincial land surveyor, shall be entitled to demand or take for his attendance and services as an arbitrator, any greater fees than are hereinafter set down in the schedule to this Act, marked A.

2.—No arbitrator who is by profession and calling a barrister, attorney, engineer, or deputy provincial land surveyor, shall be entitled to demand or take for his attendance and services as such arbitrator any greater fees than

are hereinafter set down in the schedule to this Act, marked B.

3.—No greater fees shall be taxed or allowed to any persons called as witnesses before any arbitrator or umpire than would be taxed and allowed to the same persons in an ordinary suit before a Court having jurisdiction over the subject-matter of reference.

4.—Whenever, at any meeting of arbitrators of which due notice has been given to the respective parties, no proceedings are taken in consequence of the absence of either of the parties or because a postponement is made by the arbitrators at the request of either party to some future day, the arbitrators shall make up an account of the costs, charges and disbursements of such meeting, including the proper charge for their own attendance and that of any witnesses, and of the counsel or attorney of the party present or not desiring such postponement, and shall charge the amount thereof, or of the disbursements against the party making default in attending, or at whose request the postponement shall have been made (unless the arbitrators under the special circumstances of the case shall think that it would be unjust to charge such disbursements or costs, charges and disbursements against him), and such last-named party shall be bound to pay the same to the other, whatever may be the event of the award and reference, and the arbitrators shall, in the award make any direction or adjudication necessary for that purpose, and if such sum be payable by the party in whose favor the award is otherwise made, it may be set off against, and deducted from, any amount awarded in favor of that party.

5.—Either party to an arbitration shall be entitled to have the costs thereof taxed, including the fees to the arbitrators, by the master of either of the Superior Courts at Toronto having jurisdiction of the cause; or in cases where the arbitrators determine the amount of the costs, or where there is no cause in Court, by the master to be named in a Judge's order, which may be granted for that purpose on a proper application on affidavit, setting forth the facts.

6.—The master shall in no case tax higher fees than are set down in this Act, but upon reasonable grounds established before him upon affidavit, he may in taxation reduce the maximum mentioned in the schedules, but not below the minimum, having always regard to the length of the arbitration, and to the value of the matter in dispute and the difficulty of the questions to be decided, but he shall not tax more than one counsel fee to either party for any meeting of the arbitrators.

7.—The master may tax and allow a reasonable sum for the preparation and drawing up of the award.

8.—A revision of taxation may at any time be granted upon application to the Court or a Judge, reasonable ground being shewn.

9.—It shall be lawful for the parties who refer any matter in difference between them to arbitration, whether any cause, suit, or action be pending between them or not, to agree by writing signed by them or by making such agreement a part of their submission, to pay to the arbitrator or arbitrators, if more than one—and for this purpose an umpire duly appointed shall be included in the term arbitrators—such fees or sums for each day's attendance, or such gross sums for their taking upon themselves the burden of the reference and making the award, as the said parties shall see fit, and in every such case the fees and sums so agreed upon shall be substituted for those set down and authorized in the schedules to this Act, and shall be taxed and allowed by the master accordingly.

10.—If any arbitrator, after taking upon himself the burden of any reference, and after hearing the parties, their counsel and attorneys or evidence, as the case may be, shall refuse or delay, after the expiration of one calendar month from the close of the proceedings before him, to make, execute and deliver his award upon the matters submitted until a larger sum is paid to him for his fees than is by this Act permitted, and may be taxed; or shall receive for such his award, or for his fees as arbitrator, any such larger sum, he shall, for each and every such refusal or delay, forfeit and pay to the party who has demanded and was entitled to obtain the award, or who has paid to the arbitrator any such larger sum in order to obtain, or as a consideration for having obtained such award, treble the amount of the whole sum demanded by the arbitrator, and to obtain payment whereof he has refused or delayed as aforesaid to make, execute or deliver his award, and received by him contrary to the provisions of this Act, such treble sum or sums to be recoverable with full costs in an action of debt to be brought in either of the Superior Courts of Common Law.

11.—In all cases where an award has heretofore been or shall hereafter be made, the arbitrator making the same may maintain an action for his fees upon such award, after the same shall have been taxed, which taxation may be made at the instance of the arbitrator upon notice to any party to the reference; against whom he may afterwards bring such action, and in the absence of an express agreement in respect thereof, the arbitrator may maintain such action, after such taxation, against all the parties to such reference jointly or severally.

12.—The word "arbitrator" in the Act shall be taken to include all arbitrators, every umpire or umpires, and every referee in the nature of an arbitrator; and the word "award" shall include every umpirage and every certificate in the nature of an award.

13.—This Act shall extend only to Upper Canada.

SCHEDULE A.

For every meeting where the cause is not proceeded with, but an enlargement or postponement is made at the request of either party not less than	$2 00
nor more than	4 00
For every day's sitting, to consist of not less than six hours, not less than	5 00
nor more than	10 00
For every sitting not extending to six hours (fractional parts of hours being excluded) when arbitration is actually proceeded with, for each hour occupied in such proceedings, at the rate of not less than	1 00
nor more than	1 50

SCHEDULE B.

For every meeting where the cause is not proceeded with, but an enlargement or postponement is made at the request of either party, not less than	$4 00
nor more than	8 00
For every day's sitting, to consist of not less than six hours, not less than	10 00
nor more than	20 00
For every sitting not extending to six hours (fractional parts of hours being excluded) where the arbitration is actually proceeded with, for each hour occupied in such proceedings, at the rate of not less than	2 00
nor more than	3 00

An Act to extend the Act to impose duties on Promissory Notes and Bills of Exchange to all Notes & Bills of whatever amount, and otherwise to amend the said Act.

[Assented to 18th September, 1865.]

Whereas it is expedient to impose duties on promissory notes and bills of exchange now excepted from the operation of the Act passed in the session held in the twenty-seventh and twenty-eight years of Her Majesty's Reign, chapter four, and otherwise to amend the said Act: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—Upon and in respect of every promissory note, draft or bill of exchange, for an amount less than one hundred dollars, made, drawn or accepted in this Province upon or after the first day of January, in the year one thousand eight hundred and sixty-six, there shall be levied, collected and paid to Her Majesty, for the public uses of the Province, the duties hereinafter mentioned, that is to say:—

On each such promissory note, and on each such draft or bill of exchange, a duty of one cent, if the amount of such note, bill or draft, does not exceed twenty-five dollars;—a duty of two cents if the amount thereof exceeds twenty-five dollars but does not exceed fifty dollars,—and a duty of three cents if the amount thereof exceeds fifty dollars but is less than one hundred dollars.

2.—The Governor in council may from time to time direct stamped paper to be prepared for the purposes of the Act cited in the preamble and of this Act, of such kinds and bearing respectively such device as he thinks proper, and may defray the cost thereof out of any unappropriated monies forming part of the Consolidated Revenue Fund; but the device on each stamp shall express the value thereof, that is to say, the sum at which it shall be reckoned in payment of the duties imposed by the said Act, and by this Act; and any such stamp on the paper on which any note, bill or draft is written shall have in all respects the same effect as an adhesive stamp of the same value; and all the provisions of the thirteenth section of the Act cited in the preamble shall apply to the stamps on paper stamped under this section as fully as to the adhesive stamps mentioned in the said Act, as shall also all other provisions of the said Act which can be so applied, and are not inconsistent with this Act.

3.—Upon, from, and after the first day of October next after the passing of this Act, it shall not be necessary that the signature or part of the signature of the maker or drawer, or in the case of a draft or bill made or drawn out of this Province, of the acceptor or first endorser in this Province, or his initials, or some integral or material part of the instrument, be written on any adhesive stamp affixed to any promissory note, draft, or bill of exchange, but the person affixing such adhesive stamp, shall, at the time of affixing the same, write or stamp thereon the date at which it is affixed, and such stamp shall be held *primâ facie* to have been affixed at the date stamped or written thereon, and if no date be so stamped or written thereon such adhesive stamp shall be of no avail; any person wilfully writing or stamping a false date on any adhesive stamp shall incur a penalty of one hundred dollars for each such offence.

4.—No party to or holder of any promissory note, draft, or bill of exchange, shall incur any penalty by reason of the duty thereon not having been paid at the proper time and by the proper party or parties, provided that at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the proper party or parties, and that he pays such duty as soon as he acquires such knowledge,—and any holder of such instrument may pay the duty thereon, and give it validity, under section nine of the Act cited in the preamble, without becoming a party thereto;—In this section the word "duty" includes any double duty payable under the said section nine.

5.—This Act shall be construed as one Act with the Act cited in the preamble, and hereby amended, all the provisions whereof not inconsistent with this Act, shall apply to the duties and penalties hereby imposed as if such duties and penalties were imposed by the said Act.

UPPER CANADA REPORTS.

QUEEN'S BENCH

(Reported by C. ROBINSON, Esq., Q.C., *Reporter to the Court.)*

REGINA v. SMITH.

Practice court—Habeas corpus—C. S. U. C. ch. 10, *sec.* 9.

A judge in Practice Court has no authority to grant a rule *nisi* for a *habeas corpus ad subjiciendum*; and where such rule had been issued there returnable in full court, it was discharged on this preliminary objection.

[Q. B., E. T., 1865.]

J. B. Read obtained a rule in the Practice Court, calling upon the Attorney-General to shew cause why a writ of *hebeas corpus ad subjiciendum* should not issue to the keeper of the Common Gaol of the County of Kent, to bring up the body of Andrew Smith, for his discharge from custody. This rule was made returnable in this court.

Robert A. Harrison, shewed cause.

He took a preliminary objection, that the Practice Court had no authority to grant such a rule, citing *Sams and The Corporation of Toronto*, 9 U. C. Q. B. 181, and subject thereto the rule was argued upon the objections raised to two warrants upon which the prisoner was committed.

DRAPER, C. J.—The power of a single judge sitting in banc during Term in the Practice Court is conferred by sec. 9 of Consol. Stat. U. C. ch. 10, in these words—"Every such judge so sitting apart in banc shall hold the Practice Court, and shall have the same powers and authority as belong to either of such Superior Courts in any way relating to the business of adding or justifying bail, discharging insolvent debtors, administering oaths, hearing and determining matters on motion, and making rules and orders, in causes and business depending in either of the said courts, in the same manner and with the same force, validity and effect as might be done by the court in which such causes or business may respectively be depending."

I think the words of the act do not include such a proceeding as the issuing the rule to shew cause above stated. Till this rule was moved there was no cause or business depending in relation to the prisoner's conviction or commitment, and the foundation for the jurisdiction of the judge sitting in the Practice Court did not exist.

The prisoner was brought before my brother *Hagarty* on a writ of *habeas corpus*, in order to apply for his discharge on the same objections as have been now raised, and was after argument remanded.

I have been made aware of the grounds of that decision, and as at present advised concur in them, though I cannot say I have arrived at a final conclusion (*a*).

On the preliminary objection this rule must be discharged.

My brother *Hagarty*, not having been able to consider the case with us, takes no part in this judgment.

MORRISON, J., concurred.

Rule discharged.

GWYNNE v. THE GRAND TRUNK RAILWAY CO.

Sheriff's fees—C. L. P. A. sec. 271—*Construction of.*

A judge's order, under C. L. P. A. sec. 271, fixing the allowance to be made to the sheriff where there has been a seizure under execution but no money levied, is final.

In this case the sheriff rendered his bill, and the plaintiff obtained a summons to reduce it or determine what would be a reasonable charge. *Semble*, that the sheriff should have applied, in order to authorize him to make charges not sanctioned by the tariff.

Semble, also, the judge's duty is not to tax the sheriff's account, but to fix a rate of charges for services rendered, leaving it to the Master to determine the amount in case of dispute.

[Q. B., E. T., 1865.]

In Hiliary Term, *Stephens* obtained a rule calling on the plaintiff to shew cause why the order made by *Morrison, J.*, on the 3rd of February, 1865, should not be rescinded.

The order was made under the 271st section of the Consol. Stat. U. C. ch. 22, C. L. P. A. which, among other things, provides that if the real or personal estate of a defendant be seized or advertised on an execution, but not sold, from any cause, and no money be actually levied, the sheriff shall not receive poundage, and the court out of which the writ issued, or any judgs thereof in vacation, may allow him a reasonable charge for any service rendered in respect thereof, in case no special fee be assigned in any table of costs.

The sheriff in this case received a *fi. fa.* against goods, upon which proceedings were stayed, and there was neither sale nor advertisement. He rendered a bill of his charges, without having obtained any rule of court or judge's order allowing any of those for which no special fee is assigned in the tariff.

Upon this the plaintiff obtained a summons, to reduce, or determine the amount which should be deemed a reasonable charge, on which the above order was made.

Gwynne, Q.C., shewed cause.

DRAPER, C. J.—Regularly, as it seems to me, the sheriff should have applied, in order to obtain the authority to claim the fees or charges not sanctioned by the existing tariff. However, both parties appeared before my brother Morrison, who made the order above mentioned, fixing what, upon the affidavits before him, he deemed "a reasonable charge."

The sheriff moves to rescind the order, on the ground that it does not allow to him as many days possession money as he claims to be entitled to, and that the sum allowed for each day's keeping is too small.

I rather incline to the opinion that the more regular course would have been to have fixed by the judge's order the daily sum which should be allowed for possession money, and if the number

(*a*) The judgment in Chambers is reported in 1 U. C. L. J. 241, N. S. [Rep. note.]

of days was in dispute to have referred that point to the Master, who would then have a complete tariff to enable him to tax the sheriff's whole bill. No objection is however urged except those above stated.

In my opinion the order of the judge in vacation as to what is to be deemed "a reasonable charge" for services not provided in any tariff, is as final as a rule of court on the same subject would be in term; and I arrive at this conclusion, among other reasons, because I think it was not meant that either the court or a judge should tax the sheriff's account, and determine what services the sheriff had rendered, but that they should supply the foundation for ascertaining what he is entitled to, by fixing a rate of charge for services rendered and for which no rule of court or tariff has made any provision.

I think therefore the rule should be discharged, but without costs, as the point has not been previously raised.

My brother *Hagarty*, having considered this case with us, concurs in the judgment.

Morrison, J., concurred.

Rule discharged.

The Queen v. Wheeler et al.

Con. Stat. U.C. cap. 117—Recognizance improperly estreated—Relief of bail.

Where bail entered into a recognizance conditioned for the appearance of their principal to answer a charge of assault with intent to commit rape, and the only bill found against the accused was for the more serious offence of rape, and their recognizance estreated for his non-appearance to answer that charge, a rule was made absolute for their relief from the estreated recognizance.

[Q. B., E. T, 1865.]

John McBride, during Easter term last, obtained a rule calling upon the Attorney-General or his agent to show cause why the writ of *fieri facias* issued to the sheriff of the county of Kent, against Josiah Hewson and John Myers, in this matter, should not be set aside, or all proceedings thereon perpetually stayed, on (among others) the following ground: that William Wheeler was committed on a charge of rape and attempting to procure an abortion, and the condition of the said recognizance was that he should take his trial on a charge of assault with intent to commit rape, and the bill found by the grand jury against the said Wheeler was for rape and that only; or why the said recognizance and the said writ of *fieri facias* should not be discharged and set aside on all or any of the grounds mentioned in the rule, and on the other grounds set forth in affidavits and papers filed; or why such order should not be made regarding the discharge of the said forfeited recognizance as this court should deem fit on the return of the said rule.

The recognizance was in the following form:

County of Kent, } Be it remembered, that on
to wit. } the tenth day of March, in the year of our Lord 1865, Josiah Hewson, of the gore of Camden, and John Meyers, of same place, personally came before me, the undersigned, one of Her Majesty's justices of the peace in and for the said county, and severally acknowledged themselves to owe to our Sovereign Lady the Queen the several sums following, that is to say: the said Josiah Hewson in the sum of two hundred dollars, and the said John Meyers in the sum of two hundred dollars, of good and lawful money of Canada; to be made and levied of their several goods and chattels, lands and tenements, respectively, to the use of our said Lady the Queen, her heirs and successors, if William Wheeler fail in the condition following.

Taken and acknowledged the day and year first above mentioned, at Chatham, before me.

(Signed) Thos. McCrea, [L.S.]
Police Magistrate.

The condition of the above recognizance is such, that whereas the said William Wheeler was charged, before James Smith, Esq., and other justices then present, for that he the said William Wheeler, within six months past, did assault Emily Wilson with intent to commit rape upon the said Emily Wilson; if, therefore, the said William Wheeler will appear at the next Court of Assize and Nisi Prius and General Gaol Delivery, to be holden in and for the county of Kent, and plead to such indictment as may be found against him by the Grand Jury, for and in respect of the charge aforesaid, and take his trial upon the same, and not depart the court without leave, then the said recognizance to be void, or else to remain in full force and virtue.

The bill found by the grand jury was for rape, and it was for non-appearance to the bill so found that the recognizance was estreated.

The only point argued was that as to the difference between the recognizance and the bill found, and the effect thereof on the obligation of the bail.

Robert A. Harrison, during last Trinity term, showed cause.

John McBride supported the rule.

Hagarty, J.—We think this estreat cannot be sustained. The condition of the recognizance was for the appearance of the accused to such indictment as should be found against him for an assault on Emily Wilson with intent to commit rape; but the bill found was for the more serious offence of rape. Bail might well be content to become bail for the appearance of the accused to answer the lesser charge, and yet refuse to become so on a charge more grave. They did not become bail for the appearance of the accused to answer a charge of rape, and his non-appearance to answer that charge was no breach of the recognizance. The rule must be made absolute for the relief of the bail.

Morrison, J., concurred.

Per cur.—Rule absolute.

The Queen v. Ritchie.

Con. Stat. U. C. cap. 117—Bail—Condition of recognizance—Meaning thereof—Relief from estreat.

Held, that under an ordinary recognizance of bail on an indictable charge, the accused is not bound to appear unless a bill be found against him; when therefore the accused was called, though the grand jury had not, owing to absence of witnesses, an opportunity of finding a bill, and his recognizance estreated, a rule was made absolute for the relief of the bail.

[Q. B., E. T., 1865.]

D. McMichael, during last Easter term, obtained a rule calling on the Attorney-General or his

agent to show cause why the estreat of the recognizance of Henry Smyth and Alfred Smyth for the due appearance of above defendant, dated 27th October, 1864, should not be set aside, and why the *fieri facias* issued thereon on the 5th April, 1865, and returnable into this court, should not be set aside on the ground that no forfeiture of the said recognizance had taken place, no indictment having been found against the said Joshua Ritchie, at the Court of Oyer and Terminer and General Gaol Delivery, in the county of Kent, at which the said Joshua Ritchie was to appear, and that no breach of the condition of the recognizance had been made, and on grounds disclosed in affidavits filed.

It appeared that on or about the 25th October last, Joshua Ritchie was committed to the common gaol of the county of Kent, to await his trial at the then next Court of Oyer and Terminer for the county of Kent, charged with a breach of the Foreign Enlistment Act; that on the 27th October last he was admitted to bail, to await his trial at the said court; and that the recognizance was in the ordinary form.

The condition of the recognizance, which was also in the ordinary form, was as follows: "The condition of the within written recognizance is such, that whereas the said Joshua Ritchie was this day charged before, &c., for that, &c.; if, therefore, the said Joshua Ritchie will appear at next Court of Oyer and Terminer, &c., to be holden, &c., and there surrender himself into the custody of the keeper of the common gaol there, and plead to such indictment as may be found against him by the grand jury for and in respect of the charge aforesaid, and take his trial upon the same, and not depart the said court without leave, then the recognizance to be void, &c."

The witness for the prosecution not appearing, the grand jury had no opportunity of finding a bill; but the accused, notwithstanding, was called, and not appearing, his recognizance estreated.

Robert A. Harrison showed cause, and argued that the condition of the recognizance was not simply to appear if a bill were found, but absolutely to appear at the court, and there surrender himself, and (in the event of a bill being found) plead to such indictment, &c.

D. McMichael, in support of the rule, contended that such was not the legal effect of the condition, and that in practice the accused was never required to appear unless a bill were found.

Hagarty, J.—I am aware the construction for which Mr. Harrison contends has prevailed in some counties, and I think, looking at the object of the recognizance and the reason of the law, that his criticism of the words of the recognizance is too sharp. I do not think it was intended by the Legislature that the accused should appear and surrender himself unless a bill were found. The estreat of the recognizance here was therefore premature. The rule must be made absolute for the relief of bail.

Morrison, J., concurred.

Per cur.—Rule absolute.

COMMON LAW CHAMBERS.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-Law.*)

Dunn v. Jarvis.

Con. Stat. U. C. cap. 22, sec. 57—Final judgment in default of a plea—When regular.

Where plaintiff's declaration contained two counts—the first in case against a sheriff for alleged breach of duty in not paying over money levied under an execution, and the second for money had and received—it was *held*, that plaintiff could not in default of a plea sign final judgment under sec. 57 of C. L. P. Act.

[Chambers, April 19, 1865.]

T. H. Ince obtained a summons calling on the plaintiff to show cause why the final judgment entered in this cause should not be set aside, upon the ground that the action was one for damages, which could only be assessed by a jury, and upon grounds disclosed in affidavits and papers filed.

John O'Connor shewed cause.

The declaration contained two counts, the first in case against a sheriff for alleged breach of duty in not paying over money levied under an execution, and the second a count for money had and received. There being no plea filed or served, plaintiff entered final judgment, under sec. 57 of the C. L. P. Act.

Richards, C. J.—I think the declaring against the sheriff in case for a breach of duty, is not a proceeding in which final judgment can be entered under secs. 55 or 57 of Con. Stat. cap. 22. The action sounds in damages, which must be assessed by a jury. This is the best conclusion I can form in the haste in which I have been called upon to decide, and I must therefore set aside the judgment with costs. The joinder of the count for money had and received will not make the whole judgment regular, as the case of *Westlake* v. *Abbott*, 4 U. C. L. J. 46, decides.

Hooper v. Burley.

Ejectment—Judgment as on a vacant possession—Irregularity of—Idle and useless affidavits and statements in affidavits to be disallowed on taxation.

Held, upon the facts disclosed in the affidavits filed in this cause, that the premises for which the action of ejectment was brought were vacant when the action was commenced and that judgment as on a vacant possession was duly obtained and entered.

Where plaintiff filed many useless affidavits and had a great many repetitions as well as idle statements on information and belief in affidavits filed, a direction was given to the master that they should not be allowed to the plaintiff on taxation, though he discharged defendant's summons with costs.

[Chambers, April 24, 1865.]

Ejectment, for that part of No. 36, 6th Concession, Ernestown, containing sixty-six acres, being that part of the north east half which lies north of the travelled road leading, &c.

Notice of plaintiff's title, under a deed of assignment from Nicholas Hinch to the plaintiff, of a mortgage made to George Hinch, deceased, dated 23rd February, 1858.

Writ served by affixing a true copy thereof and of the notice of title to the front door of the dwelling house on the premises, on the 18th February, 1865.

Affidavit of Alexander Dulmage, that defendant does not reside in Upper Canada, but is supposed to reside either in British Columbia or

California, but where is not ascertained, that the premises in question are now, *i.e.*, on 28th Feb., 1865, vacant and were so from the 18th of that month; that various ineffectual attempts were made to serve defendants's wife who usually resides in Ernestown.

Affidavit of plaintiff's attorney, that on 7th March he searched for an appearance, but none was filed.

On this a judge's order, dated 13th March, 1865, was made, under which plaintiff on 14th of March, entered judgment for want of an appearance.

On 24th March, Eliza Burley made affidavit, that she is wife of defendant; that defendant has been absent ten years from the Province, and is as she believes residing in British Columbia; that she has been in possession of the premises since defendant's departure from the Province; that her husband is the owner and has never to her knowledge disposed of the premises; that about a year ago, Patrick Hatch and John Waddell, took forcible possession of the premises in her absence, and put plaintiff in possession; that Hatch and Waddell were indicted and convicted for forcible entry and detainer (not saying of what premises); that on 3rd March, 1865, she took possession of the premises and moved her furniture into the dwelling house, and going to Kingston left her sister and daughter in possession, and during her absence plaintiff took possession; that she did not endeavour to avoid service of the writ, and verily believes service might have been made on her.

Her attorney made oath verifying copies of the affidavits filed on the application for leave to enter judgment. One was an affidavit of the plaintiff, stating among other things his title, according to the notice of title, and that George Hinch, the mortgagee of defendant, died unmarried and intestate, leaving him surviving, his mother, his brothers Edward and Nicholas and three sisters; that all his next of kin and heirs at law assigned their interest in the mortgage to Nicholas, who assigned to plaintiff, and that the mortgage is registered; that the mortgage with interest exceeds $1,000, and is long due and unpaid. In a second affidavit the attorney verifies a copy of the indictment against Hatch and Waddell, which charged the offence as committed against the defendant, Agnes Burley.

On these affidavits a summons was granted to set aside the judgment, alleging the possession was not vacant, and therefore the judge's order of the 13th March was wrongfully obtained.

In reply, the execution by defendant of the mortgage to plaintiff, was proved by the affidavits of a subscribing witness. Nicholas Hinch also made affidavit, that he saw defendant execute that mortgage in California which was sent to to Canada and registered, and that the memorial is a true copy of the mortgage. That after the mortgagee's death, his mother and other brothers and the sisters of the mortgagee assigned to Nicholas, who placed the mortgage and a note therein mentioned in his attorney's hands, with instructions to eject one Storms and Eliza Burley, defendant's wife; and an ejectment was brought in 1863, but the mortgage and note were mislaid and have not been found and that ejectment has not been proceeded with.

The plaintiff on the 11th April, 1865, made an affidavit, stating among other things, that the person last residing on the premises before issuing of the ejectment summons (which was tested 14th February last) abandoned the possession, and the keys were about 1st February last sent to the father of defendant's wife for her, and her attorney was immediately thereafter notified (not saying by whom or on whose behalf) that the keys were sent to her, but said attorney on her behalf refused to accept possession of the premises.

In another affidavit he swore the judgment was entered on the 14th March last, and a *hab. fac pos.* issued on that day, at which date he supposed the premises were vacant, and had no knowledge that the defendant's wife was in possession.

In a third affidavit he swore that the premises were vacant when he bought the mortgage, and sent two of his men, Hatch and Waddell, to take possession, who found the back door open and took possession and were convicted on an indictment for forcible entry and detainer in so doing. That when Nicholas Hinch brought his ejectment the tenant under defendant's wife vacated the premises, and they remained vacant until Hatch and Waddell entered.

Alexander Dulmage in a second affidavit, swore that he was present on the 28th December, 1864, when Abraham Snider (presumably the tenant under defendant's wife) left these premises, and that Snider was the last person who resided thereon, before the bringing of this action; that he resided there about eight months, and after he left the possession was vacant until defendant's wife entered, about the third of March last.

Defendant's wife made a further affidavit, swearing that until the sheriff's officer under the writ of *venditioni exponas*, (probably an error in the affidavit for *habere facias possessionem*) dispossessed her, she was not aware an action of ejectment had been commenced, and that till such dispossession she had no knowledge of any paper, summons or copy thereof, or of any paper whatever being stuck on the door of said dwelling house. She also swore that on the second of March she was informed "that one tenant of the plaintiff's, formerly in possession of the premises for which this action was brought, had left, and that the dwelling house was vacant," and that she took possession the next day, and that she "was only in possession of the said dwelling house twelve days, when she was put out of possession by a sheriff's officer."

Draper, C.J.—I conclude from these affidavits, 1. That Cyrus Burley was owner in fee of these premises. 2. That he mortgaged them in fee. 3. That the plaintiff became and now is assignee of that mortgage. 4. That the mortgage is over due and that the plaintiff (no other adverse right or title being shown) has a right in law to the possession. 5. That the defendant Cyrus Burley left this Province ten years ago, and has not since returned; and that he left his wife Eliza behind him. 6. That she has no special authority from him in relation to these premises, nor any other right or authority, unless such as she may derive from being defendant's wife. 7. That she did occupy the premises (how long not

appearing) after her husband went away. 8. That after she left, a tenant was in possession, probably her tenant, but not distinctly shown. 9. That such tenant abandoned the premises on hearing of Nicholas Hinch's ejectment. 10 That the premises were then vacant and continued so until and for some short time after this ejectment was brought. 11. That judgment is on a vacant possession was duly obtained and entered. 12. That the defendant cannot deny plaintiff's right to possession unless the mortgage is satisfied or void or some new arrangement has been made, which is not set up in the affidavits. Therefore plaintiff is lawfully entitled to the possession, and the summons must be discharged with costs.

There are many useless affidavits and a great many repetitions as well as idle statements on information and belief in affidavits filed for plaintiff. They should not be allowed to plaintiff on taxation.

Summons discharged with costs.

Hope v. Muir et al.; (Bank of British North America, *Garnishees.*)

Married Woman's Act—Con. Stat. U. C. cap. 73—Marriage, 28th May, 1859—Attachment of interest arising from her legacy to answer her husband's debts.

Where, on a debt contracted in the year 1855, plaintiff, on the 26th November, 1864, recovered judgment against M. and others, he was held entitled to attach the interest of moneys arising out of the amount of a legacy deposited by the wife of M. in her own name in the Bank of the garnishees, she having been married on the 28th May, 1859.

[Chambers, June 3, 1865.]

On a debt contracted in the year 1855, the plaintiff recovered a judgment in this court against the defendant Muir and others, on the 26th November, 1864, for $1,492 47, which is still due and unpaid.

On the 28th May, 1859, the defendant Muir married Eliza his present wife, who, by the will of her late uncle, Robert W. Harris, took to her own use a legacy to a large amount. Part of the interest arising therefrom, namely, $462 22, she lately deposited, to her own credit, in her own name, in the Bank of British North America, at its agency in Hamilton.

This money, by an order dated the 16th May, 1865, was ordered to be attached, and the garnishees were called upon to show cause why they should not pay it over to the judgment creditor.

After the service of this order, Muir and his wife sued the garnishees; and while the garnishee proceedings were pending, were proceeding to enforce the payment of the money.

Whereupon the defendants in that action and the garnishees in this matter applied for leave to pay the money into court, which was granted, and they paid it into court.

Some preliminary objections were raised by the attorney of Mrs. Muir, which were not pressed, and the sole question raised was, whether this money was liable for the debt of Muir.

J. Wilson, J.—It is enacted by chapter 73 of the Consolidated Statutes of Upper Canada, section 2, among other things, that every married woman, who, on or before the 4th day of May, 1859, married without any marriage contract or settlement, shall and may, from and after that day, notwithstanding her coverture, have, hold and enjoy all her personal property not then reduced into the possession of her husband, whether belonging to her before marriage or in any way acquired by her after her marriage, free from his debts and obligations contracted after the 4th day of May, 1859, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried.

It has not been shown what the provisions of the will of the late Mr. Harris were; but the attorney for Mrs. Muir stated on oath that the moneys were the sole and only property of Mrs. Muir, and were a portion of certain moneys settled on her and her issue by Mr. Harris, and are by the terms of the settlement entirely beyond the control of her husband or his creditors. He is here speaking of the principal moneys, for on the argument the money in question is spoken of as the interest which Mrs. Muir had received and deposited in her own name and to her own credit. It is now in court, having been paid in at her suit, her husband joining in the action.

I take it for granted that in making so great and so sudden a change in the law of property as this statute (Con. Stat. U. C. cap. 73) did, the Legislature intended to save the rights of those who had made contracts on the faith of the law as it stood before the passing of this act. The money in dispute would then have been Muir's. But under the circumstances disclosed on oath and admitted on the argument, the statute leaves the rights of the parties as if no change had been made in the law. This money ought therefore, I think, to be paid to the judgment creditor.

Order accordingly.

UNITED STATES REPORTS.

SUPERIOR COURT.

Before Robertson, C. J., Garvin and McCunn, J.J.

Wilkins v. Earle et al.

Liability of innkeepers for money lost from safe.

(Continued from p. 249.)

Beyond that, unless the innkeeper has voluntarily and knowingly undertaken the custody or care of property, no case has adjudged his liability: some elementary writers and some dicta make him liable for everything a traveller chooses to bring into an inn. Judge Story, in his Commentaries, states the liability in general terms (p. 306, sec. 470); Chancellor Kent, in his, extends it to "all the moveable goods, chattels and moneys of the guest which are within the inn" (2nd vol. 593). In *Coyle's* case (*ubi sup.*) it is said to embrace even documents relating to the title of lands and choses in action. In *Kent* v. *Shuckard* (Q. & Ad. 803) the only question raised was, whether the innkeeper was liable for money as well as other chattels, and it was held that he was: the amount lost in that case was only fifty pounds, and it was stated to have been kept to meet daily expenses only. In *Quintin* v. *Courtney* (Hay [N. C.] 41) the amount was only two hundred dollars; and the case of *Fowler* v. *Dorlon*, in our own court (24 Barb. 384), is a direct con-

flict with the principle held in that case. In *The Berkshire Woollen Company* v. *Proctor* (7 Cush. 417), although the money lost was more than sufficient to defray the expenses of the particular guest in whose charge it was, it was the property of another person, and left with such guest to pay to others who were guests at the same inn, or to defray their expenses there, they being witnesses in a law suit, whose management was the errend of such guest at such inn, and all such circumstances are dwelt upon in the opinion delivered in that case. Nothing was said, except in general terms, in *Purvis* v. *Coleman* (21 N. Y. 111) about the liability of an innkeeper who had not given any notice to his guests of means provided for the safe keeping of their property. In that case he was held to be exempt from liability for a loss, in consequence of the failure of the guest to avail himself of such means after notice. In the case of *Giles* v. *Libby*, *ubi sup.*, it was held that ornaments or money usually carried about the person by a prudent man did not come within the provisions of the statute of 1855 (cap. 421), exempting innkeepers from liability for goods of a guest not deposited in a place of safe keeping provided by them, after notice of such provision, as the money lost (twenty-five dollars) was held not to be more than a prudent person might carry about with him.

Being thus at sea in regard to direct decisions as to the extent of an innkeeper's liability for the goods of his guest, we can only have recourse to indirect recognitions of the true doctrine in decided cases, to analogies to the liability of other persons and principles drawn from the origin and nature of the legal relation of the innkeeper and his guests.

It has always been conceded that, upon all the goods for whose safe keeping he is liable, an innkeeper has a lien for the keeping of his guest (*Grinnell* v. *Cook*, 3 Hill, 485; *Ingoldsbee* v. *Wood*, *ubi sup.*), even when they are not the property of his guest (*Robinson* v. *Walter*, Bulstr. R. 269; S. C. Poph. 127). But in the case of *Broadwood* v. *Granara* (10 Ex. 417; S. C. 1 Jurist, N.S. 19; 2 L. J. Ex. 1), it was held that an innkeeper was not bound to receive a piano with a guest, and therefore had no lien upon it. Counsel in that case said, in argument, that he was "only compellable to take in such articles as both in nature and quality are reasonable for a traveller," to which Parke, B., assented, and added, "He is bound to take in those things with which a person ordinarily travels; * * * to receive all goods which by his public profession he engages to receive;" but put the pertinent interrogatory, "Is he bound to take in articles of extraordinary bulk?" to which I would add, "or value?" the principle being precisely the same.

The origin of the liability of an innkeeper to his guest for the loss of the latter's property while in his inn, the principle or policy applicable to it, and indeed the whole relation, are so analogous to those applicable to a common carrier and a passenger transported by him, in relation to what is called his "baggage," that the extent and conditions of their liability have been held to be the same (*Orange County Bank* v. *Brown*, 9 Wend. R. 85; Jones on Bailment, 103; Edwards on Bailment, 414). The definite term baggage, it is true, has been applied only to the property of the passenger carried about with him for travelling purposes, for which the carrier is liable; and probably if the same term had been applied in legal phraseology to the goods of a guest at an inn, for whose safe keeping an innkeeper was liable, the question of liability would have been long since settled. The same obligation is imposed upon both, upon account of the public character of their occupation of receiving travellers, by the carrier as passengers and by the innkeeper as guests, which involves also the necessity of receiving their travelling equipments, although the carrier escapes liability if they are not delivered directly into his custody (*Tower* v. *Utica and Schenectady Railroad Company*, 7 Hill, 47; *Cohen* v. *Frost*, 2 Duer, 335). Generally, neither receives separate compensation for care in regard to such baggage (*Powell* v. *Myers*, 20 Wend. 591), except when a carrier receives compensation for it as freight. The same danger, in both cases, of fraud or carelessness on the part of the innkeeper and carrier, or their servants, and the impossibility of the constant attention of the owner of the goods to their safe keeping, is the ground of liability. Although the carrier has been held to be exempt from liability for money destined to meet travelling expenses (*Orange County Bank* v. *Brown*, 9 Wend. 85), yet this rule does not prevail when travelling abroad (*Duffy* v. *Thompson*, 4 E. D. Smith), in which case even a gun carried in a trunk and the tools of a trade have been included (*Davis* v. *Cayuga and Susquehanna Railroad Company*, 10 How. 330); articles usually worn about the person, such as a watch and articles of jewellery, are included in such liability, if in a trunk (*McCormack* v. *Hudson Railroad Company*, 4 E. D. Smith, 81). And although it is laid down in general terms that everything destined for the personal use, convenience, and even instruction and amusement of a passenger, is included in the baggage for whose safe transportation a carrier is liable (*Hawkins* v. *Hoffman*, 6 Hill, 586), yet the extent of his liability is very much narrowed: it does not embrace merchandise (*Pardee* v. *Drew*, 15 Wend. 457), or samples of it (*Hawkins* v. *Hoffman*, *ubi sup.*), or boxes of jewellery for sale (*Richards* v. *Westcott*, 2 Bosw. 587), or silverware (*Bell* v. *Drew*, 4 E. D. Smith, 59), or presents for friends (Ib.), or regalia or jewels of a society (*Nevins* v. *Bay State Steamboat Company*, 4 Bosw. 225); and it is fully settled that the mere acceptance of a trunk or baggage containing what is not for personal use, does not bind the carrier without knowledge of such contents (*Richards* v. *Westcott*, *ubi sup.*). Of course different rules prevail in regard to a common carrier of mere freight (*Batson* v. *Donovan*, 4 B. & A. 21; *Mills* v. *Cuttle*, 6 Bing. 743), where goods of all kinds and of any amount of value are received, and a distinct compensation is paid for carrying them. Deceit practised in regard to goods carried as baggage relieves the carrier from liability, which it would not if carried as freight (*Richards* v. *Westcott*, *ubi sup.*). The presumption in regard to articles brought by travellers to an inn, as well to the depôt of a carrier for transportation, when contained in trunks or packages, and of unknown value, must be that they consist merely of the ordinary accompaniments of a traveller when travelling, and not articles or securities for com-

mercial or other purposes: if they are more, both the innkeeper and the carrier are at least entitled to notice of their value and character beyond that extent.

Previous to the introduction of the law allowing parties to be witnesses for themselves, travellers, in case of a loss at an inn of their personal effects, were allowed to testify to the contents of their trunks (*Taylor* v. *Monnot, ubi sup*), and this was placed on the ground of the necessity of the case, counterbalancing the consideration of any danger arising therefrom by the fact that the loser could only recover to the extent of the value of what usually is carried by travellers. But the evil arising from such admission of testimony, which would be slight when confined within such limit, would become gigantic if a traveller could testify to the loss of articles of indefinite value, as to which there would be no power of contradiction.

It is possible that the liability of an innkeeper may be divided into two elements, as well as that of a carrier (*Dorr* v. *N. J. Steam Navigation Company*, 4 Sandf. 136), and that he may under that which makes him liable as a bailee be so liable for goods received by him into his inn, when, either from their appearance or actual notice, he knows they are not the usual accompaniments of a traveller as such, and assents to their reception, but still such notice would be requisite.

It is very plain that it would be highly unjust, and not founded upon any principle upon which an innkeeper's liability rests, for a traveller to bring into an inn unobserved any amount of valuables without notice to the innkeeper, and hold him responsible for their safe keeping. There must be some restriction or qualification of such liability, if it exist; and that must be a warning to the innkeeper of the extra risk he is about to run. It is not very material, in such cases, whether such notice is made a condition of such liability, or the want of it is made such negligence on the part of the traveller as to be assumed to have contributed to the loss, and thereby exonerate the innkeeper (*Pettigrew* v. *Barron*, 12 Wend. 324; *Giles* v. *Fauntleroy*, 13 Id. 216; *Martin* v. *Brown*, 1 Cala. 225; *Fowler* v. *Dorlon*, 24 Barb. 384). In the case last cited (*Fowler* v. *Dorlon*) it was held to be such negligence in the traveller, who delivered his valise containing money to a servant of the innkeeper, not to have informed him of the fact, as to deprive him of the right of recovery for its loss. In this case, therefore, unless a special contract was made by the delivery by the plaintiff of the package of valuables in question to the clerk of the defendants on the occasion proved, the question of notice will be essential. If no special contract was made, and no notice given, the liability of the defendants would depend upon precisely the same principles as if the package in question had been taken from the plaintiff's room in the inn of the defendants.

If any special contract was entered into by the transaction between the plaintiff and the clerk on the occasion in question of the delivery of the package to the latter, it could only have been by virtue of some authority given to the latter to make such contract. The safe in which the plaintiff requested such package to be deposited, was one provided by the defendants, pursuant to the provisions of the statute of 1855, already referred to, and such clerk was not authorized to make any other contract except that to be implied from the mere receipt and deposit of the package in such safe, exactly in the condition in which it was. No authority was proved or found to have been given to him to agree to become responsible for parcels of unknown value. The notice posted in the hotel of the defendants required a package to be deposited to be "properly labelled," and the clerk informed the plaintiff "that they made their guests describe the property before redelivery." It was therefore only for packages properly labelled the defendants undertook to be responsible, and it was only of such property as could be described their clerk undertook to take care. If the defendants were not responsible for the contents of such package before it was deposited in such safe, while in their hotel, I do not think the clerk who received it was authorized to make, or did make on their behalf, a special contract for its safe keeping at all hazards, especially when without any compensation commensurate with the risk.

This case, therefore, resolves itself into the question, whether the plaintiff, by depositing in the safe of the defendants the package which he delivered to their clerk, under the circumstances under which he so deposited it, and with no more notice of its value than was given in his conversation with him at the time of such delivery, was not guilty of such negligence, or did not so violate the implied condition of the liability of the defendants as to exempt them entirely therefrom. A notice, to be sufficient to relieve the plaintiff from the imputation of negligence, should be not only of the kind of property, but its value. Otherwise, if the innkeeper was upon other principles not bound to accept its custody, he could not fix his compensation for the voluntary risk assumed by him, and would not increase his vigilance and precautions to prevent a loss. The package was sealed up, and marked only with the plaintiff's name, which furnished no information. The plaintiff, upon being asked what it was, answered merely "money," which is equally unsatisfactory and indefiinite. Besides, the defendants notified him that, if their safe was to be used as a depository, packages deposited in it were to be "properly labeled," which, of course, involved a description of their contents, or a statement of their value. The mere information that a package contained "money," without knowledge of the amount, would not necessarily arouse the increased vigilance of the defendants. Indeed, the whole conduct of the plaintiff, including his mode of carrying the property in question, the time and place selected for changing the envelope, the sealing up with no external mark but his name, his curt reply to the question, what it was, indicate rather a reluctance to make known its value. Such acts were deficient in candour to the defendants, whose safe he chose to make the depository of his capital in business, instead of the vaults of a bank. True, he might have lost such package, even if its contents had been disclosed, and yet the defendants might have had their attention attracted to it if it had been properly labelled. By not giving proper notice, the plaintiff must

be presumed to have trusted to the safety of his place of depo it and the honesty of the clerk, rather than the responsibility of the defendants.

I am, therefore, of opinion the defendants are only liable for the amount lost by the plaintiff equal to his travelling expenses, as found by the jury; the general verdict, which is controlled by such special finding, must be reduced to that sum, and the exceptions as to the amount beyond that sustained: the other exceptions, being untenable, must be overruled, and judgment rendered for the amount so found.

Garvin, J., concurred.

DISSENTING OPINION.

Mr. Justice McCunn delivered the following dissenting opinion:

I confess to having considered this case anxiously, and I may say, with more than ordinary attention and research, for the reason that the Chief Justice has seriously changed his first views in the premises, and also from having great reluctance in putting forword my views in opposition to two of the learned justices of this court; yet I have been unable to bring my mind to the same conclusions as those recently entertained and promulgated as the opinion of the court in this case at General Term.

There is but one important question in this case; and that question is, whether Mr. Earle, as innkeeper, is liable, under the circumstances, far the large amount of money deposited with him by plaintiff?

The facts appear to be as follows:

On the 20th of April, 1863, Mr. Wilkins, the plaintiff, came to this city and went to Earle's Hotel; he registered his name and asked for a room, and was told that the house was crowded, and that he could get a bed but not a single room, and he was assigned to room No. 124; in the room was the following notice:

"Guests are cautioned against leaving money or valuables in their rooms, as the proprietors will not be responsible for them. All packages of value should be properly labeled and deposited in an iron safe, which is kept in the office for that purpose.

"Guests will please comply with the above requests, or the proprietors are relieved in case of loss from all responsibility." After said notice followed a copy of the Law of 1855, relative to innkeepers.

On the same evening, the plaintiff handed a package to a clerk in the office named Howard. Howard picked the package up, and asked Wilkins what it was. Wilkins said it was money, which he wished deposited in the safe.

The clerk then, in plaintiff's presence, procured the key of the safe, opened it, deposited the package, and locked it. Plaintiff asked him for a check. The clerk said they gave no checks, but required guests to identify their packages, and assured plaintiff no accident had ever occurred. One of the proprietors was in the office at the time, and plaintiff thinks Howard obtained the key from him. Early the next morning, before Mr. Earle was up, Howard went to Earle's room and asked him for the key of the safe, which was given. Afterwards, when Mr. Earle came down, he found the safe locked, and, as he alleges, Howard had absconded, and had taken the money of plaintiff with him, together with other moneys deposited in the safe.

These are the facts, and the simple and only question in the case is, whether, under the circumstances, Mr. Earle, the defendant, is liable in law as innkeeper to the plaintiff for the entire amount of $20,000, so received by him and deposited in his safe, or only liable for enough to cover travelling expenses, to wit: $1,000? I am clearly of opinion, that he is liable to the plaintiff to the full extent of $20,000 with interest, and my conclusions to that effect have been strengthened and confirmed by the fact, that all the cases in the English and American books for nearly the last three hundred years go, beyond a doubt, to establish the fact of his entire liability, for not one solitary case can be found sustaining the theory of a limited responsibility.

Indeed, the learned Chief Justice admits that all the cases cited in his opinion go to show, that to a certain extent, innkeepers are liable, but says we are at sea about the extent of the liability, and cites a number of cases, all of which I am compelled to say, are unlike the one at bar. According to my understanding of these cases, the innkeeper is clearly liable, but the Chief Justice maintains that none of those cases fixes or limits the extent of the liability. I think they all fix the liability to any amount the traveller may have with him in the inn. It is a well-established principle, that in the amount charged for the keep and board of the traveller, the innkeeper receives the consideration for the safe keeping of his guest, his goods, and his money; 2 Kent's Com. 758, 7th ed.; *Lane* v. *Cotton*, 12 Mod. 483, 487; *The Berkshire Woollen Co.* v. *Proctor*, 7 Cushing. 417; *Mason* v. *Thompson*, 12 Peck, 280; *Bennett* v. *Muller*, 5 Term R. 278; and this principle runs through all the cases to the present time.

The common law fixes an implied contract between the innkeeper and his guest. The innkeeper is to entertain and keep safely the guest, his money and his goods. The traveller, in consideration thereof, is bound to pay the price demanded for such entertainment, and the safe keeping of himself, his money and goods received at the inn are by law pledged to the innkeeper, for the fulfillment of his part of the contract, and it cannot therefore be said there is no consideration passing from the traveller to his host for the risk or liability incurred by the innkeeper.

This has been an undisputed principle of law for hundreds of years past, and the question that now arises is, does the statute of 1855 change this principle? The act simply says, there is to be a safe in this inn, under the absolute, especial, and immediate control of the innkeeper, his agents and servants, and unless the guest deposits his money in that safe the innkeeper is not responsible, and the rule of law is clear, that if the guest does deposit his money in that safe, the innkeeper is certainly liable to protect him against the theft of himself or servants. Any other rule of law would place the traveller at the mercy of a dishonest innkeeper and his dishonest servants without a remedy, and public policy calls for the inflexible enforcement of such a rule of law, although occasionally it may work harshly. It must be conceded that before the

law of 1855 was enacted, if a guest came to an inn, and took with him to his room $20,000, and the innkeeper's servants or agents break in and rob the guest, the innkeeper was held liable, and surely if the law of 1855 compels the guest to place that money under the absolute and immediate control of the innkeeper and his dishonest servant, he is doubly responsible, because, if this trap of a safe had not been there, the traveller might have protected his money in his room with his own means of protection. The act, undoubtedly, was to relieve the inkeeper from responsibility, where the guest was robbed of his money or goods, while they were in the room. I, therefore hold, that where the guest complies with the law of 1855, as in this case, the innkeeper should be held to a more strict accountability than he was before the law was passed. This being so, it is quite clear that the same principle that would make him liable for $10 would make him liable for $10,000. If this were not the rule, how absurd it would be to compel a traveller, under the Act of 1855, to hand an innkeeper $20,000 for safe keeping, and have the innkeeper say next morning that he received that amount from him, put it in his safe, but it was lost through his negligence, and he could only give $1,000 instead of the $20,000. That is precisely this case.

(*To be continued.*)

GENERAL CORRESPONDENCE.

Registry laws—Chain of title—Record of heirs.

To the Editors of the Law Journal.

Gentlemen,—The proposed changes in the Registry Law, while calculated to increase its efficiency, ardly, I think, embrace all the alterations to be desired. Would it not be well further to amend the law by providing some method by which the title of *heirs* should appear on the registry books? It seems to me an obvious defect in our system of registration that no such provision at present exists. Where title is claimed through an intestate a *hiatus* appears upon the face of the abstract, a link is wanting to complete the chain of the title which has to be supplied by outside proof. Would it not be advisable to adopt some plan by which all the evidence which would be necessary to enable the claimant to prove his claim in court should be placed on record and so preserved? Some such arrangement, besides affording the heir additional facilities for making a good title, would in many cases be a saving of trouble and expense to parties searching the books.

Yours respectfully,

T. Phillips Thompson.

St. Catharines, C. W., Sept. 7, 1865.

[Some such arrangement as our correspondent proposes would, if practicable, tend much to the completeness of records of title. We recommend the suggestion to the attention of our law makers.—Eds. L. J.]

Chattel mortgages—Charge for copying—When not done by clerk—Legality of charge for search when mortgage more than two years old.

To the Editors of the Law Journal.

Gentlemen,—Will you give the public the benefit of your views on a matter about which there is a difference of opinion?

1st. When a party makes a search of a chattel mortgage, and takes certain extracts (*e. g.*, date, parties, and articles mortgaged), have I any right to charge him more than 10 cents? The party does not want a copy of the mortgage at all, but simply for his information takes a short memorandum of those particulars.

2nd. Have I any right to charge 50 cents if the chattel mortgage is more than two years old, on the ground (*vide* C. C. Tariff of Fees) that it is a search "exceeding two years," or a "general search," which the tariff provides for?—"Every search exceeding two years, or a general search, 50 cents." Some lawyers say that this has reference only to searches in suits, and that I have no right to charge 50c., but must be guided by the charges given by the Chattel Mortgage Act.

I want only what is right, and as different clerks have different views, please answer.

A Clerk.

Sept. 21, 1865.

[Clerks of County Courts, with whom chattel mortgages, &c., are filed, can only charge the fees by law allowed for services performed in regard to such chattel mortgages, &c. They are as follows:

1. For filing each instrument and affidavit, and for entering the same in the book, twenty-five cents.

2. For searching for each paper, ten cents.

3. For copies of any document, with certificate prepared, ten cents for every hundred words.—(Con. Stat. U. C. cap. 45, sec. 14.)

It will be observed that the act does not in terms make it obligatory upon the clerk to allow a person making a search to take a copy or extract. Hence some clerks refuse this

privilege, unless upon the terms of payment for the copy or extract, as if made by themselves.

We have always doubted the legality of this exaction, and would be glad to find it contested and decided. Any one, upon payment of ten cents, has a right to search for and to see the instrument filed. When he sees it he has a right to read it. He has a right to recollect the entire contents of it, and, if his memory is a good one, from memory write it out in the same room, or in the next room. Why should he not be allowed, without extra cost, to aid his memory by the use of a pen or pencil? The copy or extract may or may not be correct, but the clerk is in no way responsible for its correctness. Where he does no work, and assumes no responsibility for the work done, it is difficult to understand why he should be allowed to charge for it, as if done by himself and certified as correct.

The charge of fifty cents for a chattel mortgage more than two years old, is wholly indefensible. The tariff has no reference whatever to chattel mortgages.—Eds. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. May 8.

Re Sadd.

Solicitor and client—Taxation—Costs incurred before retainer—Composition deed.

A solicitor was retained by a debtor to prepare a composition deed, the first trust of which provided for the costs of its preparation. The trustees accepted the trusts, and various sums were received and paid by the solicitor on account of the trustees. The trustees obtained a common order for taxation of the solicitor's bill of costs.

Held, that the solicitor was entitled to set off against his receipts the costs of and attending the preparation of the deed, though incurred prior to the retainer by the trustees, and though no action could be maintained for them against the trustees. (13 W. R. 1009.)

M. R. Banks v. Gibson. July 21.

Partnership—Dissolution—Right to use name of firm.

On the dissolution of a partnership each partner is, in the absence of any special agreement, entitled to trade under the name or style of the old firm.

The plaintiff's husband, B., and the defendant for many years carried on business under the style of B. & Co. The plaintiff, on the death of her husband, continued the partnership in pursuance of a proviso in the articles of partnership. The plaintiff and defendant afterwards dissolved partnership by mutual consent, and no stipulation was made with respect to the use of the name of the firm. The defendant continued to trade under the style of B. & Co., while the plaintiff traded in her own name B. It was proved that orders intended for the plaintiff were sent to the defendant, but no fraud was established.

Held, that the plaintiff was not entitled to an injunction to restrain the defendant from trading as B. & Co. (13 W. R. 1012.)

M. R. Grant v. Grant. July 10.

Married woman—Gifts by husband to wife—Separate property—Evidence of voluntary gifts.

In order to establish the fact of a gift of chattels from a husband to his wife, there must be clear and distinct evidence corroborative of the wife's testimony. It is not necessary that he should deliver them to a trustee for his wife; it is sufficient if he constitutes himself a trustee for her by making the gift in the presence of a witness, or by subsequent statements to a witness that he has made the gift: but a mere declaration of intention to give is not sufficient.

Semble, presents made by a husband to his wife, whether in contemplation of or subsequent to their marriage, are the separate property of the wife, and do not form part of the husband's personal estate.

Observations on the evidence necessary to support a voluntary gift. (13 W. R. 1057.)

APPOINTMENTS TO OFFICE.

COUNTY JUDGE.

GEORGE SHERWOOD, Esquire, commonly called the Hon. George Sherwood, to be Judge of the County Court of the County of Hastings. (Gazetted Sept. 2, 1865.)

NOTARIES PUBLIC.

HIRAM McCREA, of Frankville, Esquire, to be a Notary Public in Upper Canada. (Gazetted Sept. 16, 1865.)

THOMAS PHILLIPS THOMSON, of St. Catharines, Esq., Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Sept. 23, 1865.)

ANDREW THOMAS DRUMMOND, of Kingston, Esquire, Barrister-at-law, to be a Notary Public in Upper Canada. (Gazetted Sept. 23, 1865.)

FRANCIS EDWIN KILVERT, of the City of Hamilton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Sept. 23, 1865.)

THOMAS FERRIS NELLIS, of the City of Ottawa, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted, Sept. 23, 1865.)

CORONERS.

JESSE SHIBLEY, Esquire, Associate Coroner, County of Lennox and Addington. (Gazetted Sept. 2, 1865.)

DUGALD L. McALPINE, Esquire, M.D., Associate Coroner County of Middlesex. (Gazetted Sept. 2, 1865.)

JOHN HARRIS COMFORT, Esquire, M.D., Associate Coroner, County of Lincoln. (Gazetted Sept. 16, 1865.)

JOHN FERGUSSON, of Appin, Esquire, M.D., Associate Coroner, County of Middlesex. (Gazetted Sept. 23, 1865.)

JOHN R. ASH, of Centreville, Esquire, M.D., Asociate Coroner for the United Counties of Lennox and Addington. Gazetted Sept. 23, 1865.)

TO CORRESPONDENTS.

"T. Phillips Thompson"—"A Clerk"—Under "General Correspondence."

"Rate Payer" in current number of *Local Courts' Gazette*.