Canada Law Journal.

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DIARY FOR MAY.

1. Sun....2nd Sunday after Easter.
3. Tues... Supreme Court sittings, Primary Exam.
4. Wed...Primary Exam.
5. Thurs..Primary Exam.
8. Sun.....3rd Sunday after Easter.
9. Mon...Hon. George Brown died, 1880.
10. Tues...Court of Appeal sitt. begin. Co. Court sitt. or York begin.
11. Wed...Final Examination.
12. Thurs.,Final Examination,
13. Fri.....Final Examination,
14. Sat.....Final Examination.
15. Sun.....4th Sunday after Easter.
16. Mon...Easter Term begins.
18. Wed..D. A. Macdonald, Lieut.-Gov. Ontario, 1875.
21. Sat....Confederation of B.N.A. Provinces proclaimed, 1867.
22. Sun....Rogation Sunday. Earl Dufferin Gov.-General, 1872.
24. Tues..Queen's Birthday, 1819.
26. Thurs..Ascension Day.
29. Sun.....1st Sunday after Ascension.
30. Mon...Proudfoot, V. C., appointed, 1874.

TORONTO, MAY 1st, 1881.

RICHARD ALLEYN, Q. C., of the city of Quebec, has been appointed Puisne Judge in the Superior Court of the Province of Quebec, in the room of the Hon. F. J. Baby, who has been appointed Judge of the Court of Queen's Bench.

Mr. E. E. Kay, Q. C., has been appointed to the vacancy in the Chancery Division of the High Court of Justice in England caused by the death of Vice-Chancellor Malins. He was born in 1822, was called to the bar in 1847 and received silk in 1866.

WE understand that Mr. Ewart intends issuing a new edition of his "Manual of Costs" immediately after the new tariff under the Judicature Act is promulgated.

We publish in another place a decision of the United States District Court at Detroit in a maritime case, which will be read with interest. Whether or not the judgment states the law correctly, and it seems to do so, it is a valuable addition to the learning on the subject.

A WRITER in the *Legal News* takes the reporter of the Supreme Court to task for alleged inaccuracies in the early notes of cases furnished by the latter. We would remind the person making the objections that whilst accuracy is of course desirable, it is not expected that more is to be given in these early notes than the general drift of the decision. An exact digest of the judgment is necessary when the case is reported, but it would be unfair to expect an unassailable digest of the whole case in the short hurried note that the reporter is asked to furnish. We have much pleasure in bearing witness to the marked improvement that has taken place in these reports since the first few numbers. We had occasion to comment strongly and not very favorably at first on various matters; but Mr. Cassels and Mr. Duval have evidently determined that they will, as far as possible, prevent the necessity of any unfavorable criticism for the future. We thank them also for their uniform courtesy.

AN evil, to which attention has more than once been drawn in these columns, has been removed by the Judicature Act. It has been the practice of several County Court Clerks, that could be named, to do a class of conveyancing which does not accord with the

"eternal fitness of things." For example, it is not at all desirable, for obvious reasons, that County Clerks should draw or advise upon chattel mortgages, bills of sale, or renewals thereof, or prepare Surrogate Court papers, &c. Section 65 now enacts that "no Clerk or Registrar of the Surrogate Court shall for fee or reward draw or advise upon any will or other testamentary paper, or any paper or document connected with the duties of his office, for which such fee is not expressly allowed to him by the tariff in that behalf; and no Clerk of a County Court shall for fee or reward draw or advise upon any chattel mortgage, or any other paper or document connected with the duties of his office, and for which a fee is not expressly allowed by the tariff in that behalf."

THE JUDICATURE ACT.

The following points are noted from the advanced sheets of the work of Messrs. Taylor & Evart on this Act. We fear that other mistakes and difficulties will be discovered when the statute undergoes the test of practical working; but in a legislation of this kind we must not expect perfection:—

1. In England one of the rules requires that a writ for service out of the jurisdiction shall only be issued upon a judge's order; and it has been held that after a writ has been so issued it is unnecessary to obtain, as formerly, an order for leave to proceed, the matter to be proved upon both applications being obviously the same, viz., that the case was one proper for trial in England. In the Ontario Judicature Act the English rule requiring a judge's order is omitted, and it is provided that after service an order may be obtained allowing the service (O. VII. rules 1, 4.) But the English form of judge's order is left among the forms as No. 110. This order prescribes the time for service, which would be very necessary in England, but not so in Ontario, where the rules themselves make provision (O. VII. 2.)

2. A Divisional Court is one of the Common Law Courts, or the Court of Chancery, with their present quota of three judges, yet in sec. 29 s. s. 3, a Divisional Court shall be constituted by "two or three, *and no more*," of the judges thereof.

3. As under O. IX. r. 3, judgment may be signed in default of appearance upon an acceptance of service and an undertaking to appear. The procedure in rule 6 should make the same provision.

4. O. IX. r. 6. Has a statement of claim to be delivered or not? The rule has it both ways. The difficulty arises from inserting in the rule taken from the English rule after the word "file" in the sixth line the words "and serve," without noticing the confusion it makes.

5. By sec. 62 the Accountant is to have the same judicial and other powers as he now has. There has been no such officer since 26 June, 1876, (see G. O. Chy. 625, 626. See also sec. 68.)

6. Are the Referee in Chambers and Mr. Dalton to continue to discharge their judicial functions, or be superseded by the Master in Chambers? (See sec. 62 and O. XLIX. r. 6).

It would be well to remember that a number of corrections appear in this Act, as it now stands in the statute book just issued; the former issues are therefore not in all respects reliable.

NOTANDA IN APPELLATE PRACTICE.

In general, no appeal can be brought upon a mere matter of form: *Henderson* v. *Malcolm*, 2 Dow. 285. Where a question arose upon the form of the pleadings and the House of Lords was of opinion that the

pleadings would not allow the question to be properly decided,—time was given to arrange for an alteration of the pleadings in *Bristol* v. *Robinson*, 4 H. L. C., 1068. In the case of the *Marchioness of Bute* v. *Mason*, 7 Moo. P. C. Cases 1, Lord Kingsdown said, "there is a question raised as to the frame of the bill. If justice could be done, as the bill is at present framed, we should be anxious to do it, though at the expense of technical rules." Another eminent judge (Knight Bruce, L. J.) in *The Board of Orphans* v. *Kregelius*, 9 Moo. P. C. C. 447, adopts the same language. "It is a wholesome principle of this Court to disregard points of mere form raised upon an appeal, when they do not in any manner affect the substance of the subject in controversy, and have not in any respect a tendency to mislead or prejudice the defendant." So objections of a formal nature as to the reception of evidence, which has not been objected to below, will not be entertained: *Frankland* v. *McGirty*, 1 Knapp 310. When defendant objects to a want of parties to the bill that contention cannot be raised for the first time on appeal: *Mullins* v. *Townsend*, 2 Dow. & L. 430. And Lord Campbell laid down the safe general principle thus: "A safe maxim for Courts of Appeal to be governed by, is that an objection, which if taken, might have been cured, and which has not been taken in the Court below, shall not be taken in the Court of Appeal." *Dhurm Das Pandey* v. *Mussurat Shaman*, 3 Moo. Ind. App. 229, 242.

It is a rule of the Privy Council never to disturb the sentence or decree of the Court below unless they find mistake either of law or fact—either error in principle, or a mistake as to fact in applying a right principle: per Sir J. Patteson, in *The Netherland's Company* v. *Styles*, 9 Moo. P. C. C. 294.

But directions as to costs may be varied in appeal when the appeal is on the merits, and not merely for the sake of costs: *Latour* v. *Queen's Proctor*, 10 H. L. C. 693.

So it is a general rule that no appeal lies on a bare point of practice: *Ferrier* v. *Mowbray*, 7 Wil. Shaw & McL., 158; *Mellish* v. *Richardson*, 1 Cla. & Fin, 235, 236; *Ferrier* v. *Howdon*, 4 Cla. & Fin. 32. Somewhat modifying this, it is held in other cases that a Court of last appeal is not disposed to disturb a decree on a matter of practice which is within the discretion of the Court below, and does not depend on principle: *Ironmonger's Company* v. *Attorney General*, 10 Cla. & Fin. 929; *Wanehope* v. *North British R. Co.*, 4 Macq. 348; *Browne* v. *McClintock*, L. R. 6 H. L. 456. In the last decision in the House of Lords the rule is formulated thus: In matters of practice, when the judges below are unanimous, the Lords never vary their decision, unless perfectly satisfied that it is founded on erroneous principles, and contrary to natural justice: *Cowan* v. *Duke of Buccleugh*, L. R. 2 App. 344.

BULKY SUITS.

In spite of legislative appliances, such as Common Law Procedure and Administration of Justice Acts, designed to simplify and expedite the working of that mill of justice which impatient suitors are prone to think grinds both "slowly" and "exceedingly small," "heavy" and long-drawn-out cases are still not unfrequently met with in this Province. The main cause of this is no doubt the increasing number and complexity of interests incident to the development of a civilized country. Very frequently the public take as much interest in cases such as *McLaren* v. *Caldwell* or *Fisher* v. *Georgian Bay Transportation Co.*, as the profession do, and follow with unabated interest from day to day the voluminous reports of the evidence given by the press. Such cases as these, however sink into utter insignificance when compared with that of *Lloyd* v. *Vickery*, lately tried before the Supreme Court of New

South Wales, which has already lasted for seven years and is not even yet finally disposed of. We subjoin a few particulars as to this great case, taken from the *Queenslander*, in the patriotic hope that their perusal may tend to prevent any Canadian "exodus" to the Antipodes:—

"For seven long years has this great case dragged its slow length along. And even now there is a prospect of another appeal. In some respects the gentlemen who conduct these cases must, we suppose, be familiar with the details. It is questionable whether any one man has read the whole of the vast mass of documentary evidence contributed. The primary judge, Mr. Justice Hargrave, says that *he* has, and the primary judge must be believed. The Chief Justice says he has mastered it as well as he can, though he has not read everything, that nine-tenths of it is wholly irrelevant; and that the mass of matter which he has thus had to master was an opprobrium to the administration of justice. The exhibits and briefs were so voluminous it seems, that they were delivered to counsel in chiffoniers or cabinets under lock and key, all assorted and pigeon-holed in such a way that they could be attacked systematically and with due deliberation. One witness alone was in cross examination before the master in equity for sixty-three days. After all this kind of evidence had been collected before the master in chambers, assisted by clerks and shorthand writers, it had to be argued out and read in Court. The primary judge protested against this infliction; but as it had been taken by his instructions, the learned counsel insisted that he should at least hear it read; and read it was accordingly, the reading alone taking a fortnight of the orthodox Court sittings. No wonder, under these circumstances, that it takes years before a case of this kind can be matured for judgment. And then, when judgment comes, the whole process has probably to be gone over again, in preparation for another appeal to a higher tribunal. No wonder that Chief Justice Martin stands aghast in the presence of the ten reams of exhibits neatly packed in cabinets and duly docketed in convenient pigeon-holes for perusal. All this, in its way, is an exhibition of art, the growth of an artificial system; but it exists not, surely, for any other purpose than the final exhaustion of the litigants. It is a travesty of justice, and simply represents the power of the purse—the *vis inertiæ* of possession which holds on to what it has by all the craft which the subtle usages of the law can devise."

PRESENT STATE OF THE MARRIAGE LAW.

This subject, which has been effectively reviewed by the Imperial Legislature, stands forth as one which pre-eminently points out a need of legislative treatment in this country. Marriage with a deceased wife's sister has been ably and fully discussed in the Dominion Parliament as well as in the secular and religious press of the country, and may receive further elucidation in our columns,—those who are favorable to the law being settled on this one point, (if it be not settled by judicial decision already,) or being changed so as to make it free from doubt, will probably return to its consideration during the next session of Parliament. But we think there are other points on which legislation is needed; and, reading the reports of two cases of bigamy recently brought before one of our western courts, suggests that the whole subject may be fairly brought up for legislative revision.

In the distribution of legislative powers made by the B. N. A. Act (sec. 91, sub-section 26) Marriage and Divorce is assigned to the exclusive legislative authority of the Parliament of Canada. There is no subject upon which there is a greater necessity of uniformity of action and community of sentiment than the one before us. In Ontario the solemnization of marriage is committed exclusively to clergymen and ministers of religion, duly ordained or appointed to administer the rites and ceremonies of the churches or denominations to which they belong; and by virtue of that ordination or appointment, and according to the rites and usages of such churches or denominations, they, and they

only, may solemnize marriage between persons who are not under legal disqualification. Passing over the provisions of law with regard to the necessity for a license, or its equivalent by publication "once openly, in an audible voice, either in the church, chapel, or meeting-house, in which one of the parties has been in the habit of attending worship, or in some church, chapel, meeting-house, or place of public worship with which the minister or clergyman who performs the ceremony is connected, &c.," we think it not without profit to point out the presumptions which flow from this state of the law, and its manifest defects. It cannot be denied that the canon law of England was introduced in this Province by the Constitutional Act—that by the provisions of 33 Geo. III, ch. 4, Presbyterian, Lutheran and Calvinist ministers were allowed to celebrate marriage between certain persons, provided they were not under any legal disqualification; then 11 Geo. 4 ch. 36, confirmed marriages previously celebrated of persons not under canonical disqualification, and authorized ministers of certain denominations to solemnize marriage between persons not under legal disqualification. Subsequently other acts were passed which are found referred to in C. S. U. C. ch. 72 and R. S. O. ch. 124, from an analysis of which it will be seen that ministers of religion of all the various denominations have now the exclusive right, under certain restrictions, to solemnize the ceremony of marriage between persons under no legal disqualification to contract such marriage. In other words, they are officers of the law to whom is committed the duty of such solemnization, and of duly returning the same for public registry.

There is only one exception to the foregoing rule, and that is set forth in the 20th section of the existing statute, which provides that every marriage duly solemnized between members of the religious society called Friends, or Quakers, according to their rites and usages, shall be valid, and all duties ordinarily imposed upon a clergyman are, with regard to such marriages, to be performed by the clerk or secretary of the society or of the meeting at which the marriage is solemnized.

Thus we find that, with the exception just referred to in favor of Quakers, every person desirous of being married to another, whether he or she belongs to a Christian denomination or not—whether or not a Deist, Atheist, or freethinker, must *ex necessitate* submit to the rites of a Christian church, and be married by one of its regularly ordained and recognized ministers, or else not be married at all.

That clergymen and ministers of the denominations, other than the Church of England and the Roman Catholic communion, were in the eye of the law regarded as officers of the law is manifest, because before acting as such they were required to present to the Court of General Sessions of the Peace the proof of their ordination and appointment, and like other public officers on their appointment, on assuming the discharge of their functions of office were obliged to take the oath of allegiance. This, however, was regarded as a stigma, because clergymen of the Churches of England and Rome were not required to pass through such an ordeal, but were permitted to solemnize marriage *ex officio* by virtue of their orders, and therefore the pre-requisites of attending the General Sessions and taking the oath were dispensed with by law.

The loose manner in which marriages are now solemnized by these officers of the law is too notorious to require much comment at our hands. We may, however, refer to the many instances in which ministers have performed the marriage ceremony between mere children, who were obviously too young to be able to give their consent to a legal marriage.

In one of our western counties this most reprehensible practice has been severely censured by the Judge in his charge to the Grand Jury. We will close what we have to

say on this matter in the present number by quoting a portion of his charge, which puts in strong relief the evil complained of, reserving for another occasion our further consideration of this important subject :—

"It has been long contended by the Christian Church, and acceded to by the custom of most civilized countries, that the solemnization of marriage is a religious ordinance, or at all events a ceremony so far connected with the well-being of society that the sanction of a Christian minister should be had to sanctify and bless it. Such is the view of that institution which is enforced by our marriage law—and yet, nothwithstanding, we find so-called Christian ministers so far forgetting themselves and their duty to society as to occasionally stand by to bless and unite in marriage *children* who have eloped from their parents. Not many days ago, a boy of 16 and a girl of 14 years eloped from their parents in Aylmer and went to Springfield and presented themselves to some sort of a minister there, and were married by him. Now this man, whom we are obliged by courtesy to call a Christian minister, in consummating this deed, knew he was committing an improper, immoral and unneighborly act, and one which would not be sanctioned by any well ordered Church or community. Again, a young man elopes with a young girl whom he has conveyed down a ladder from the window of a mother's house, and a minister's willing services are invoked, not because he is their pastor, but because he is a willing tool; he knows, and they all know that the pastor who, under other circumstances, should assuredly have been called upon to perform such a ceremony, would have refused to so outrage the feelings of a widowed mother, as to have solemnized a marriage between a mere child and a confirmed sot and common drunkard; and the minister who did it knew all the facts, but when remonstrated with said, Oh! what did I care? I made $2 by it!"

There is no doubt but that there is only too much ground for these timely and well-merited strictures on a practice which cannot be too strongly condemned, and that a renewed consideration of the whole subject is urgently called for at the hands of those whose duty it is to cure the diseases of the body politic.

SELECTION.

AGENCY IN MANSLAUGHTER.

The case of *Regina* v. *Salmon*, in the Court for the Consideration of Crown Cases Reserved, which received a good deal of public attention at the time the decision was given, will now be better understood from the report of the case which appears in the February number of the *Law Journal* Reports. Unfortunately, the prisoners were not represented by counsel; and therefore the decision, not being strengthened by dealing with arguments advanced against it, is not so satisfactory as it might have been. Considering that this Court is the final Court of Appeal in criminal matters, some relaxation of the rule that accused persons cannot be assisted out of public funds ought to be allowed. The employment of counsel to argue for the defendants would not so much have been for their benefit as for the benefit of the public. The point involved was one which, above all others, requires to be placed in various lights. It was, in the first place, a charge of homicide by culpable negligence, raising in itself probably the most difficult issue known to the criminal law. Secondly, it raised the question of agency or responsibility for the criminal act of another—a head of law which ought most carefully to be kept within due bounds. The result of the decision may be said to be that when several persons are engaged in an unlawful act—unlawful not in the sense of criminal but in the more comprehensive sense—and one of them is guilty of homicide, all may be convicted of manslaughter.

The facts to which the law had to be applied may be very shortly stated. George Salmon, one of the defendants, is a volunteer, and one summer evening, after practice, he took his rifle away with him, contrary to rules, and provided himself with several cartridges. He was joined by his brother John Salmon, and Hancock, the other two prisoners, and

all three having set up a door in a tree, fired at it at a distance of 100 yards. The deceased, a little boy of ten, was in his father's garden, standing on an apple tree so as to water a rose tree. His young sister was near and heard two shots, the second of which killed the boy. There was no trustworthy evidence to show who fired the fatal shot. The son of the owner of the field, who provided the door to fire at, and stood near the defendants, was a witness, and said that four shots were fired, but who fired which shot he could not tell. He thought, too, that the second shot struck the target, which was rather in conflict with the sister's evidence. George Salmon, to screen his brother, said it was he who killed the boy; but, on the other hand, he said it was the second shot which he fired. Hancock said they all three fired one each. There was thus evidence of the death of the boy by one of three defendants, but no proof which of the three it was. There does not seem to have been evidence against John Salmon that he fired a shot at all. The jury, however, found all three prisoners guilty of manslaughter, and the Court for the Consideration of Crown Cases Reserved upheld the conviction.

There seems to be little doubt that the defendants were guilty of an unlawful act. It was proved that all three expressed an intention to fire, and, as shots were fired, to the extent of the unlawfulness of that act they were all three responsible. That the act of firing at a target placed high in a tree, with a rifle carrying a distance of a mile or more, in the neighborhood of houses and gardens, and without any precautions whatever, was culpably negligent, and, therefore, an unlawful act can hardly admit of dispute. If the firing were contrary to the Highway Acts, for example, the conviction of all the defendants would undoubtedly have been proper. But they were indicted for manslaughter, and the mere unlawful act of which they were guilty was not criminal in itself. To make it criminal, there must be added the fact that the death of the boy was caused by it. The mind must not be misled by the consideration that if all three defendants were not convicted, no one on the evidence could be convicted. If it were essential to bring home the death to a particular defendant, the failure of that proof must bring about the failure of the charge. It may not unfairly be argued that the defendants who did not fire the shot which caused the death were no more guilty of manslaughter than the man who lent the field for the purpose of firing. The same consideration is, perhaps, better put by saying that the present decision is capable of a dangerously wide application. If it is not necessary to show that the defendant actually fired the shot producing the death, it is not necessary to show that he fired at all. Possibly the decision goes as far as this, because there seems to have been no evidence that one of the three fired, except that he was among those who did, and shots were heard. We do not think, however, that it was intended to go so far. Lord Coleridge, in giving judgment, said: "The prisoner who fired the fatal shot committed manslaughter; but as the other two joined in the act and fired shots also, they are all guilty of manslaughter." In other words, an active part must be taken in the dangerous act to produce guilt. Suppose, for example, instead of a rifle, a cannon had been used. Clearly those who brought the cannon into position, and who charged and pointed it, would be equally responsible, with the man who actually fired, for the consequences of the shot. The decision, however, is not, in our opinion, satisfactory, as the considerations arising out of the case were barely dealt with. It is difficult to divest the mind from the feeling that the result would have been different if the fatal shot had been clearly brought home to one of the three defendants. In that case, if all three had been charged, would the judges have confirmed the conviction as to all? This is the question which tests the decision. Suppose, for example, two men on bicycles are racing along a road at a furious pace, and one of them kills a passer-by. Would both be guilty of manslaughter? On the principle of the present decision, we suppose they would; and yet the bicyclist who did not kill the deceased might have possessed superior skill or a powerful brake, so that if the deceased had crossed his path there would have been no accident. In the same way one or other of the defendants in *Regina* v. *Salmon* might have hit the target every time, so that he could not possibly have done the mischief, and yet he is made responsible for the bad shooting of his companions. We do not say this is not the case, according to the somewhat severe law of responsibility for the acts of companions in force in England; but the reasoning in *Regina* v. *Salmon* has not persuaded us that it is.—*Law Journal.*

NOTES OF RECENT DECISIONS.

LIBEL.

In *Com.* v. *Willard*, Erie Sessions, Pennsylvania, February 28, 1881, it was held that it is no defence to an indictment against one who is the editor and publisher of a newspaper that the libellous article complained of was written and inserted by the local editor of the journal, without the knowledge of the defendant, and in violation of a general order forbidding the publication of any article of a libellous nature without first submitting it to the publisher for his approval. The court said: "Aside from the incalculable damage that may and often does result to the innocent from a misuse of the press in the hands of reckless or malicious persons, and the consequent caution proper to be exacted from those managing newspapers as to the selection of the subordinates in whose hands they intrust this dangerous power, there is the peculiarity incident to the profession of a publisher that the publication of a journal, or a magazine, or a book, is not the visible, manual act of the publisher himself, but is made up of the labors of many different persons, in no one portion of which he may have an actual part. He may not be present at or witness any single one of the various processes of work by which the completed book or newspaper is finally produced; he may not even see it when done and issued to the public, and yet the publication is his act. This is in part, no doubt, the reason why the law of libel forms an apparent exception to the usual rule that one can only be liable criminally for his own individual acts. That such is the law, whatever may be the reason for it, there would seem to be no question. It was established by a long line of cases in England, decided by such judges as Hale, Mansfield, Raymond, Kenyon, Powell, Foster, Ellenborough, and Tenterden, and which will be found fully stated in a note in Starkie on Slander, 1st Am. ed., vol. 2, pp. 30-34. It is found clearly recognized in all the leading text-books on criminal law, and has also been recognized and affirmed by the courts in many of the States of the Union." This is supported by Roscoe Crim. Ev. (6th Am. ed.) 621; Whart. Cr. Law, § 2564; *King* v. *Gutch*, 1 M. & M. 433; *Com.* v. *Morgan*, 107 Mass. 199; *Perrett* v. *N. O. Times*, 25 La. Ann. 170. *Smith* v. *Ashley*, 11 Metc. 367, is overruled by the later Massachusetts cases. The court concluded as follows: "The present case, it will be observed, is not that of a libel surreptitiously smuggled into a newspaper by an employee whose position did not authorize him to prepare or select matter for its columns, as was the fact in *Goodrich* v. *Stone*, 11 Metc. 486, for the article was prepared by the local editor, employed for and entrusted with that branch of the business, and it was done in the usual course of his daily occupation. Nor is it the case of objectionable matter shown to the publisher and by him refused, and afterward printed against orders, nor was it a fraud or imposition practised upon a publisher, by which he was misled. It is not even the case of a publisher absent from the town, and obliged to trust the management to another during his absence. As shown by the testimony of the defendant himself, it was simply the case of an editor and publisher of a newspaper leaving his press and office to the sole control of a subordinate, and with such apparent indifference to the outcome of this confidence that up to the time of his arrest he had not even seen the publication complained of. It may be considered by judicious, thoughtful men, who are in favor of the freedom of the press, but opposed to its license, that this case furnishes in itself an illustration of and an argument for the wisdom of the rule, but be that as it may, it is my duty to enforce the law as it is, and not to theorize as to what it ought to be."—*Albany L.J.*

RIGHTS AS TO BURIAL PLACE.

In *Weld* v. *Walker*, Massachusetts Supreme Court, January, 1881, we find a novel question decided, Chief Justice Gray delivering the opinion. The plaintiff, in a bill in equity, alleged in substance, that two days after the death of his wife he consented to her burial, in a coffin and grave-clothes procured by himself, in a lot in the cemetery of the defendant corporation, owned by the husbands of two sisters of his wife; that he consented to such burial while in great distress of mind, and worn out by taking care of his wife during her last illness, and yielding to continued importunities of the sisters and the husband of one of them,

much against his own wishes and feelings, "fearing that they would make trouble for him if he did not consent," and "which he should not have done had his mind been in condition to realize the situation;" that he has no right or authority to take care of or adorn her grave in that lot, or to bury other of his or her family or friends there, or to be buried himself by her side; that he owns jointly with his co-heirs a lot in the Mount Hope Cemetery, in which his father and mother are buried, and in which he wishes that his late wife, and himself at his death, may be laid; that he desires to remove to this lot her remains, with the coffin containing them, and the stones and monuments placed by him at her grave; and has obtained a permit in due form from the proper board of health for that purpose; that he has requested of the defendants permission to do so in a careful and proper manner, doing no damage to the lot in which she is now deposited, and leaving that lot in good condition; and that they have refused such permission. *Held*, that upon these allegations, if supported by evidence, it was within the authority of the justice before whom the hearing was had, to decide that the plaintiff never freely consented to the burial of his wife in the lot of the defendants' cemetery, with the intention and understanding that it should be her final resting-place; and that a Court of Chancery might order the defendants to permit him to remove her body, coffin, and tombstones to his own lot. The doctrine of ownership of a dead human body was learnedly discussed and adjudged in *Pierce* v. *Proprietors of Swan Point Cemetery*, 10 R. I. 227; S. C., 14 Am. Rep. 667, and it was held that a widow, having consented to the burial of her late husband in a lot purchased by him, could not afterward, against the wishes of his only child, remove the remains to another cemetery.—*Ib.*

On the subject of a widow's right to appoint the burial place of her husband, attention is called to the recent decision by Justice Macomber, of the New York Supreme Court, in *Southworth* v. *Southworth*, which may be read in connection with *Weld* v. *Walker*, *ante*. The plaintiff and her husband were residents of this State, as was the husband's father, the defendant. The husband died February 15, 1880, and his remains were placed in a receiving vault at Geneva in this State, at the suggestion of the defendant. Before his death the plaintiff had expressed a desire to remove his remains, after his death, to Louisville, Kentucky, the residence of her parents, and to bury them there, in her father's lot, to which her father had consented. On the husband's death, the plaintiff removed to Louisville, where she remained till May, 1880, when she returned to this State, where she now resides. About the first of April, 1880, without her knowledge or consent, the defendant caused the remains to be buried in his own lot at Geneva. The plaintiff, wishing to carry out her purpose to inter the remains at Louisville, brought this action to restrain the defendant from interfering with the disinterment of the remains, and the removal of them to Louisville. Justice Macomber upon these facts decides as follows: 1. That presumptively, and in the absence of circumstances and facts overcoming such presumption, and in the absence of a lawful request made by the deceased in his life-time, the plaintiff as wife of the deceased has the right of controlling the place of burial of the deceased. 2. That such right is not absolute, but conditional, and must yield to considerations which make the assertion of such right unreasonable or inequitable. 3. That under the facts established in this case, the plaintiff had not and has not the right to remove the remains to the State of Kentucky, nor to disturb them in their repose. That the plaintiff's complaint be dismissed upon the merits, but not with costs. This is an interesting, and so far as we know, a novel question, and we shall probably hear more of it.—*Albany Law Journal.*

CONTRACT.

It has been held by the Supreme Court of the United States in *Congress and Empire Spring Co.* v. *Knowlton* that where a contract is illegal (being *malum prohibitum* and not *malum in se*) money paid by one party in part performance can be recovered back when the other party has performed no part of the contract and both parties abandoned such contract before it was consummated.

A New York corporation, in violation of the laws of that State, provided for an increase in its capital stock. This increased stock was subscribed for and an assessment paid thereon.

Thereafter the plan for increasing the stock was abandoned by the corporation and an adjustment with subscribers authorized by its trustees. In an action by a subscriber to recover from the corporation the amount of the assessment paid by him, *held*, that it was no defence that the payment was made upon an illegal transaction.—*Central Law Journal.*

CONTEMPT.

Still another curious question of contempt came up in England, before the Court of Appeal, in *Platting Company* v. *Farquharson*, on the 23d of March last. This was the same case in which the Vice-Chancellor had held that it was contempt to advertise in a newspaper for funds to carry on an appeal. The present alleged contempt was an advertisement in a newspaper offering a reward of £100 to any one who could produce documentary evidence that the process to which the patent in question related had been performed before the year 1869. The plaintiffs alleged that the publication of this advertisement was a contempt of court, and applied to the Court of Appeal for an order to commit the publishers. It was urged that the advertisement would tend to induce the forging of documents, and reliance was placed on the case of *Pool* v. *Sacheverel*, 1 P. W. 675, in which Lord Chancellor Macclesfield committed for contempt a person who had inserted in a newspaper an advertisement offering a reward to any person who should discover and legally prove that a marriage, the validity of whch was in question in the suit, was invalid. The Lord Chancellor was of opinion that the advertisement was a direct inducement to subornation of perjury. The Court of Appeal refused the application. Jessel, M. R., said that the advertisement had been inserted by the publishers in the ordinary course of business, and it was clear that they had no intention of interfering with the administration of justice. In order to justify an order for committal, it must be shown that the advertisement, on the face of it, would convey to the mind of a person of ordinary intelligence that it would tend to interfere with the administration of justice. In his lordship's opinion the advertisement was a very harmless one; £100 was not a very large sum, and documentary evidence was not easily forged. The notion that the advertisement would induce the forgery of documents was a wild one, and was not founded on any reasonable construction of it. It was a common practice to offer rewards for the discovery of a lost deed or a lost marriage certificate, and his lordship had never heard it suggested that it was illegal. He did not profess to understand the case *Pool* v. *Sacheverel*, as it was reported, and said that if necessary he should disregard it. He thought it inconsistent with the practice of government in offering rewards for the conviction of offenders.—*Albany Law Journal.*

NOTES OF CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

VACATION COURT.

Cameron J.] [March 25.

REGINA ex rel. CLANCY v. ST. JEAN.

Alderman—Declaration of qualification—R. S. O. ch. 174, sec. 265—Quo warranto.

The declaration required by the Municipal Act R. S. O. ch. 174, sec. 265, from every person elected under the Act to any office requiring a property qualification, is a pre-requisite to the discharge of the duties of such office.

Where an alderman elect did not state in his declaration the nature of his estate in or the value of the land, but declared that his property was sufficient to qualify him "according to the true intent and meaning of the Municipal Laws of Upper Canada," *Held*, that the declaration was insufficient.

Held, also, that his right to the office on this ground, and for the want of a qualification at the time of his election, might be questioned by a *quo warranto* at the instance of a ratepayer not a voter of or resident in the ward, and who therefore could not be a relator under the Municipal Act. *Regina ex rel. White* v. *Roach*, 18 U. C. R. 226, and *Kelly* v. *Macarow*, 14 C. C. 457, distinguished.

Held, also, that the relator was not too late, having applied in the next term after the election, and only one day after the time for moving under the statute.

Mosgrove, for relator.

J. W. W. Ward, contra.

IN RE CLANCY V. CONWAY.

Municipal Councillor—Qualification.

A person, who, having himself no license, but in connection with a license to his son, sells liquors by retail, is not disqualified under sec. 74 of the Municipal Act, from holding the office of Alderman, though he may have rendered himself liable to penalties for breach of the Liquor License Act.

The declaration of qualification not having been made, leave was given to defendant to make the same within ten days, otherwise, following *Reg. ex rel. Clancy* v. *St. Jean*, ante. leave was granted to file an information.

Mosgrove, for relator.

J. W. W. Ward, for defendant.

CHANCERY.

Full court.] [April 19.

NEILL V. CARROLL.

Mechanics' Lien Act—Computation of time.

Upon re-hearing, the judgment of Spragge C., reported in 28 Gr. 30 was affirmed with costs.

JELLETT V. ANDERSON.

Ferry, disturbance of—License of right to ferry—C. S. U. C., cap. 43, sec. 10.

Upon re-hearing, the judgment of Spragge C., reported in 27 Gr. 411, was affirmed with costs.

Blake, V. C.] [April 14.

MCDONALD V. FORBES.

Presumption of death and intestacy—Evidence—Partition.

Where there was evidence of a negative nature, which, though not conclusive, was sufficient to warrant the presumption of the death of certain parties, and also that they had died intestate, the Court, in the absence of positive proof, refused to presume that they had died unmarried or without issue.

While granting partition and sale of lands in which such persons, if alive, would be entitled to share, the Court [BLAKE, V. C.] directed inquiries to be made in the neighborhood where they had last been heard of, and advertisements to be issued, their shares to remain intact in the meantime, till evidence could be produced on this point.

REPORTS.

ONTARIO.

FIRST DIVISION COURT, RENFREW.

(Reported for the LAW JOURNAL by M. J. Gorman, Esq. Barrister-at-law.)

FINDLAY V. SAYERS.—MCINTYRE, Garnishee.

Attachment of debts—Insolvent Act—Privileged claim.

The primary debtor, Sayers, made an assignment, under the Insolvent Act of 1869, on the 2nd March, 1875. He had previously become indebted to the primary creditor, Findlay, in $9.25, on an open account. The insolvent, by an oversight, omitted to enter the name of the primary creditor in his schedule of creditors, annexed to the deed of assignment, or to include this claim in his statement of liabilities. Thomas Deacon, on the 23rd March, 1875, became Assignee of the estate. No dividend had yet been declared, nor had the insolvent obtained the execution of any deed of composition, or any consent to discharge, nor been discharged by the Court, and the estate still remained in the hands of the assignee.

In March, 1879, the primary creditor obtained a judgment against the insolvent for $9.25 debt, and $2.78 costs.—The primary creditor did not come in and prove his claim in the insolvent Court, or seek to be put on the list of creditors.

In 1880, the insolvent became entitled to a sum of $13.10, from the garnishee, McIntyre—which amount was due to him for his *personal*

labor for the garnishee, and performed since the date of his assignment, but not protected by 37 Vict. ch. 13, inasmuch as the claim of the primary creditor accrued prior to 1st Oct., 1874—and the amount was not more than adequate for the support of himself and family.

In September, 1880, the primary creditor issued the garnishee summons in this cause, and when the case came up for trial on the 2nd November, 1880, the assignee intervened and claimed the amount so earned by the insolvent, and on the same day the insolvent filed a supplementary list of creditors, in which he placed the name of the primary creditor for the amount of the account due in 1874—thus placing the primary creditor in the same position in regard to him and his estate as if his name had been inserted in the first list of creditors.

The assignee contended that under the Insolvent Acts of 1869 and 1875, and amendments, he was entitled to the amount due by McIntyre, as part of the insolvent's estate, and liable to distribution for all his creditors.

Burritt, for the primary creditor, contended that the assignee was not entitled to the amount coming from the garnishee, on the ground that the amount, being for the *personal labor* of the insolvent, did not pass to the assignee; and that as the assignee could not claim it, the primary creditor who had resorted to this garnishee proceeding and having intercepted the money in the garnishee's hands, had the only right to it, and could apply it to the satisfaction of his claim—notwithstanding the palpable preference this would give him over other creditors.

DEACON, Co. J. The question is now whether the assignee of the insolvent's estate, representing all the creditors, or this one creditor, Mr. Findlay (who has stepped out of the ranks, and is proceeding on his own behalf, irrespective of the provisions of the Insolvent Act), or either of them, is entitled to the money earned by this insolvent by his personal labor.

I am of opinion that neither of them is so entitled.

That the Assignee is not entitled to claim the money I think is quite clear from an examination of the cases of *Chippendall* v. *Tomlinson*, 4 Doug., 318; *Williams* v. *Chambers*, 10 Q. B. 337; *White* v. *Elliott et al.*, 30 U. C. R., 253; *Wadling* v. *Oliphant*, 1. Q. B. D. 145.

It is not alleged or pretended that the insolvent has accumulated the amount indicated by Lord Alvanley, C.J., as in 4 Doug. * * *

Then as to the right of this primary creditor, who is now on the same footing, in all respects, as the rest of the insolvent's unsecured creditors, there is nothing in any of the cases that would support the contention that one creditor (without any exceptional right), by adopting proceedings outside of the Insolvent Act, could obtain from either the insolvent himself or from his estate (and for the personal advantage and benefit of such creditor alone) what the assignee of the insolvent's estate, who represents all the creditors, and who is bound to treat all alike, without the slightest approach to preference or priority, could not be allowed to do. If, as against such assignee, the *personal earnings* of the Insolvent are exempted, for the necessary and humane purpose of allowing him to live at all, surely the same *ratio decidendi* will apply, with at least equal force, to such a proceeding as the present on the part of one of the creditors, contrary, as I take it, to the whole tenor and policy of the Insolvent Acts—see sections 16, 39 and 83, also *Patterson* v. *McCarthy*, 35 U. C. R. 14; *Blakeley* v. *Hall*, 21 C. P. 138; *Re Fair* and *Bell*, 2 Ap. Rep. 632. The general purpose and policy of the Act is to produce *equality* in distribution among the creditors (holding claims and having rights only of a common and equal character and nature), and when an assignment is made, the whole estate and effects of the Insolvent should be wholly administered by the Court in the Insolveney proceedings. See *Re Fair* and *Bell*, *ante* 636.

The result of my examination of authorities is that what the Assignee, who is trustee for and represents all the creditors alike, cannot be permitted to do, no one of such creditors (not holding any exceptional right, position or lien) stepping out of the ranks and adopting a by-proceeding, can be allowed to accomplish on his own behalf and for his own individual benefit. I have not been disappointed in being unable to find any authority which would uphold his doing so. What the Assignee, acting on behalf of all the creditors, may be able to accomplish in case this Insolvent acccumulates any considerable sum of money, or any amount beyond what may be sufficient for the necessary

support of himself and his family, or lays out such surplus on lands or goods, I am not at present called upon to determine. The Courts say that in the meantime "*he* (and it would appear his family, also) *must live*," and as a necessary consequence his personal earnings (not rising to the magnitude before suggested) must be held to be exempt—as against the assignee of his estate, and, as I take it, for the same reason and on the same ground, equally so as against all and every of those for whom such Assignee is the Trustee and representative. The 68th Section of the Insolvent Act would not assist the present plaintiff, as no creditor could be allowed to do anything *in the name of the assignee*, which the assignee himself, on his own motion, could not be permitted to do. The result of the whole is that there is no fund in the hands of the garnishee which this primary creditor is entitled to recover or obtain, and the cause must be dismissed, the primary creditor paying the costs taxable to Clerk and Bailiff; no other costs to be taxed as against him.

UNITED STATES.

MARITIME CASES.

IN RE "TRENTON."

Sale of American vessel by Maritime Court of Ontario—Effect of extinguishment of liens.

[Detroit, Nov. 29th, 1880.

This was a libel for supplies and materials furnished at Cleveland, the home port of the vessel, in 1876, for which a lien was claimed under the law of the state of Ohio. The present owner of the schooner appearing as claimant, pleaded in substance that in July, 1878, the libellants caused the vessel to be seized at Toronto, Ont., by virtue of a warrant issued by the Maritime Court of Ontario, upon a petition filed by the libellants for the same cause of action for which their libel was filed in this Court; that in August, 1878, one Michael Gallagher intervened with a claim for wages as watchman and ship-keeper from December 1, 1877, to June 27, 1878; that about the same time one William McAllister also intervened with a claim for wages as mate from April 4 to May 4, 1877, to the amount of $52.50; that the two last mentioned claims were consolidated, and on September 25, 1878, the vessel was condemned and ordered sold to satisfy these claims; that upon such sale she was purchased by the claimant for $1,000, and she has since been registered at the custom-house in Toronto; that notice of the pendency of these proceedings, and of the sale, was given by publication, pursuant to the practice of the Court, and by the arrest and detention of the vessel; that the Maritime Court of Ontario had jurisdiction of these causes and authority to direct the sale, and that claimant became the owner of the vessel, discharged of all liens.

It appeared from the proceedings in the Canadian case that a demurrer was interposed to libellant's petition upon the ground that the Maritime Court had no jurisdiction to enforce the claim for necessaries supplied to an American vessel in a port in the United States.

This demurrer was sustained by the Court, and libellant's petition dismissed. The vessel was sold, as above stated, by virtue of a decree rendered upon the consolidated claims of Gallagher and McAllister.

The question in this case was whether this sale was sufficient to divest the libellants of their claim for necessaries.

Moore and *Canfield*, for libellants.

Wisner and *Speed*, for the claimant.

BROWN, J. The Maritime Court of Ontario was created by an Act of Parliament of the Dominion of Canada, approved April 28, 1877, the object of which was to "establish a court of maritime jurisdiction in the Province of Ontario." The first section vested in the Court, in very brief language, "Such jurisdiction as is exercised by any existing British vice-admiralty Court." To ascertain what jurisdiction is exercised by the vice-admiralty Courts of Great Britain, we are referred to an Act of the Imperial Parliament known as "The Vice Admiralty Court's Act, 1863," which is made applicable to all existing as well as to future Vice-Admiralty Courts. The 10th section of this Act declares that these Courts shall have cognizance of what are generally known as maritime cases, viz.: Seamen's and master's wages, pilotage, salvage, towage, damage, bottomry bonds, payments of mortgages from the proceeds of sale, possessory suits, and amongst others (subdivision 10), "claims for necessaries supplied in

the possession in which the Court is established, to any ship of which no owner or part owner is domiciled within the possession at the time of the necessaries being supplied."

In considering the effect of this sale I must assume that the Dominion Parliament had the requisite authority to establish this Court, and that it possessed the powers and jurisdiction which the Act purports to vest in it. While not strictly a vice-admiralty Court (the judges of which hold their commission directly from the Crown), its jurisdiction is nearly if not quite identical with that of those Courts, and we are bound to give its proceedings such faith and credit as is given to them.

That the sale of a vessel, made pursuant to the decree of a foreign Court of admiralty, will be held valid in every other country, and will vest a clear and indefeasible title in the purchaser, is entirely settled, both in England and America. (Story on the Conflict of Laws, sec. 592; *Williams* v. *Armroyd*, 7 Cr. 423; *The Tremont*, 1 W. Rob. 163; *The Mary*, 9 Cr. 126; *The Amelie*, 6 Wall. 18; *The Granite State*, 1 Sprague, 277; in the case of the *Helena*, 4 Rob. Admr. 3, this doctrine was carried so far as to sustain a sale made after a capture by pirates. See also *Grant* v. *MacLachlin*, 4 Johns, 34.)

These cases fully establish the doctrine stated by Mr. Justice Story (Conflict of Laws, sec. 592) that "whatever the Court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer or other act, will be held valid in every other country where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of admiralty. Whether they are causes of prize or of bottomry, or of salvage, or of forfeiture, or of any of the like nature over which courts have a rightful jurisdiction, founded upon the actual, rightful or constructive possession of the subject matter."

This is not the law of England and America alone. The commercial code of France contains similar provisions regarding the judicial sale of ships.

Article, 193. "The liens of creditors shall be extinguished independently of the general methods of extinguishing obligations, by a judicial sale made according to the forms established by the following title, or when, after a voluntary sale, the ship shall have made a voyage at sea under the name and at the risk of the purchaser, and without opposition on the part of the creditors of the vendor."

In commenting upon this article, Dufour observes (Droit Maritime, Vol. 2, p. 47), "Moreover, the sale upon seizure has always had the effect, in our law, of purging the incumbrances with which the property was charged." "The decree clears all liens," said Loysel. We perceive the reason of this. These kinds of sales are made notoriously and publicly. The creditors are perfectly advised of what is passing. It is for them to take precautions to assure their payment from the price of the ship; but if they persist in remaining unknown their negligence ought not to prejudice the purchaser. To these general reasons we ought to add another peculiar to the maritime law. He who buys at a judicial sale must pay his price upon the spot. He is not bound to wait until the creditors are made known to pay into their hands. He ought, then, to be protected against their claims. Otherwise the judicial sale, instead of offering security which attracts buyers, would be only a snare from which they would eagerly escape. For these reasons, according to our article, the purchaser at a judicial sale receives the vessel clear of all incumbrances"—(p. 53) "Moreover it would not follow that the creditors are entirely disarmed by this result. On the one hand their debt, in effect, subsists; and, on the other, nothing is easier than to transfer the entire amount, with the lien which it draws after it, to the price of the ship."

Article 76 of the German mercantile code expressly provides that the lien of a ship's creditors upon the vessel becomes void:

1. "By a compulsory sale of the vessel in a home port the purchase money takes the place of the ship as regards the ship's creditors The ship's creditors must be publicly summoned to protect their rights. In other respects the provisions regulating the proceeedings for a sale are reserved to the laws of the various countries." The 600th article of the Spanish code is equally explicit. "If the sale takes place at public auction and with the intervention of judicial authority, according to the formulas prescribed by article 608, every responsibility of the ship in favor of its creditors is extinguished from the moment in which the

written evidence of sale is agreed to." Similar provisions are found in article 1398 of the Portuguese, article 193 of the Belgian, article 90 of the Italian, article 840 of the Chilian, and article 477 of the Brazilian code. In short the doctrine that the sale of a vessel by a court of competent jurisdiction discharges her from liens of every description, is the law of the civilized world.

Such sales, however, may be impeached by the owner or other person interested, by showing:

1. That the court or officer making the sale had no jurisdiction of the subject matter by actual seizure and custody of the thing sold: *Rose* v. *Himely*, 4 Cranch. 241. *Bradstreet* v. *The Neptune Ins. Co.*, 3 Sumn. 601. *The Mary*, 9 Cranch. 126. *Woodruff* v. *Taylor*, 20 Vt. 65. *Daily* v. *Doe*, 3 Federal Rep. 903. Whether it be not also essential that there should have been proper judicial proceedings upon which to found the decree, and personal or public notice of the pendency of such proceedings, it is unnecessary here to determine, since it appears that sworn petitions were filed and notice of the pendency of the proceedings given through the newspapers, pursuant to the practice of the maritime court.

2. That the sale was made by a fraudulent collusion, to which the purchaser at such sale was a party: *Parkhurst* v. *Sumner*, 23 Vt. 536. *Annett* v. *Terry*, 35 N. Y. 256. *Castrique* v. *Imrie*, L. R. 4 H. L. C. 427.

3. That the sale was contrary to natural justice: *The Flayoden*, 1 Rob. 135; *Castrique* v. *Imrie*. In case of the sale by a master the court will enquire into the circumstances and see whether it was necessary for the interest of all concerned; but the effect of such sale to discharge the liens is the same: *The Amelie*, 6 Wall. 18.

In the case under consideration none of these objections are taken to the validity of this sale, but it is insisted that it cannot be held to have discharged the vessel of liens which the court making the sale had no jurisdiction to enforce. I have found no case, except possibly that of the *Angelique* (17 Law Rep. 104, since expressly over-ruled), which lends countenance to this proposition. Upon principle it seems to me wholly untenable. It is true the vessel was originally condemned, in part at least, upon a claim for ship-keepers' fees, which would not in this country be considered to import a maritime lien: *The Thomas Scattergood*, Gilpin 1; *The Havana*, 1 Sprague 402; *The Island City*, 1 Low 375; *The Sarah Jane*, 2 Am. Law Rev. 450; *Gurney* v. *Crockett*, Abb. Ad. 493). But this was a question exclusively for the consideration of the maritime court under the laws of Canada, and the presumption is conclusive that the facts necessary to give that court jurisdiction existed: *Hudson* v. *Guestier*, 6 Cr. 281; *Comstock* v. *Crawford*, 3 Wall 396. To say that the judicial sale of a vessel frees her only from such liens as the court making the sale had jurisdiction to enforce by original process is a practical denial of the principle that such a sale vests a clear title in the purchaser. This would make the validity of the sale depend, not upon the power of the court to condemn and sell, but upon its authority to assume jurisdiction of all claims, which by the law of another country, might be liens upon her. There are probably no two countries in which the jurisdiction of the admiralty courts is identically the same. That of our own courts does not extend to all cases which would fall within such jurisdiction according to the civil law and the practices and usages of continental Europe. By the codes of most civilized nations the cost of construction, the wages of shipkeepers, the rent of warehouses for the storage of her tackle and apparel, money lent to the captain for the use of the vessel are all ranked among the privileged debts. In England the court of admiralty is vested with jurisdiction not only of ordinary collisions, but of damages done by a ship to wharves, break-waters and other fixtures annexed to the soil; while in this country it is limited to floating structures. In England a master has a remedy against the ship and freight for wages. In the United States he is confined to a proceeding *in personam*. By the law of continental Europe a lien arises for necessaries furnished in a home port, while in this country there is none unless created by a state statute, and none in England if an owner is domiciled within the kingdom. We also recognize liens for general average, wharfage, stevedores' wages and premiums of insurance, none of which are within the jurisdiction of the Admiralty Division of the High Court of Justice. We also admit claims for damage to cargoes, while the English court can only proceed against the vessel where

the cargo is brought into England or Wales and no owner is domiciled therein. It may be added that the English Admiralty has jurisdiction of accounts between part owners, and may decree the sale of a share or shares in the ship, while we can only take cognizance of such disputes incidentally to the distribution of the proceeds.

Now, if the theory of the libellant be correct, a judicial sale of a vessel in one country would free her from none of the liens which the courts of that country were enabled to enforce. A sale under such circumstances would be utterly destructive of the interests of owners and a complete sacrifice of the vessel. No one could possibly know the value of his purchase, for no one could foresee the amount of claims that might be made against the vessel in other countries. It would also compel us to inquire in each case whether such foreign court could have taken cognizance of the claim, either by original proceeding or by petition against the proceeds of sale, and, as the foreign law in each case must be proved as a question of fact, the errors and confusion into which we should fall will be readily appreciated.

The truth is, that all these liens are inchoate rights, subject to the contingency of loss in case of disaster to the vessel necessitating a sale by the master, or in case judicial proceedings are taken against her in a foreign country to subject her to claims recognized by the law of such country. The recognition of liens and the order in which they shall be marshalled and paid, pertain to the remedy, and are administered according to the *lex fori*, when the courts of such country have obtained jurisdiction of the *res* by actual seizure, they have full power to dispose of the property and to transfer the title, and such transfer will ordinarily be respected in every other country. Nor is this power limited to the final determination of the case. The title to property sold *pendente lite* will be respected in another country, though the proceedings upon which the property was originally seized, fail : *Stringer* v. *Marine Insurance Company*, L. R., 4 Q. B., 676.

In these cases of judicial sales *in rem*, the liens of creditors are not extinguished, but are merely transferred from the *res* itself to the fund in court. The decree of the maritime court deprived the libellant in this case of no right of property. It was merely adjudged that his claim was not of that character which entitled him to set the machinery of the court in motion. It does not follow that the court would not have entertained a petition by the libellant for payment from the proceeds of sale, after the satisfaction of what under the laws of Canada are maritime liens, upon proof that by the *lex loci contractus* he was entitled to a lien. It is a constant practice in our courts of admiralty to decree the payment of surplus proceeds to mortgagees and others having liens which are not enforcible by original proceedings. As Mr. Justice Story observes (Conflict of Laws, sec. 322, b) "where the lien or privilege is created by the *lex loci contractus*, it will generally, though not universally, be respected and enforced in all places where the property is found or where the right can be beneficially enforced by the *lex fori*. And on the other hand, where the lien or privilege does not exist in the place of the contract, it will not be allowed in another country, although the local law where the suit is brought would otherwise sustain it." Sec. 323—"But the recognition of the existence and validity of such liens by foreign countries, is not to be confounded with the giving them a superiority or priority over all other liens and rights justly acquired in such foreign countries under their own laws, merely because the former liens in the country where they first attached, had there by law, or by custom, such a superiority or priority." In *Harrison* v. *Sterry*, 5 Cranch, 289, Chief Justice Marshall used the following language: "The law of the place where the contract is made is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. It is extrinsic, and rather a personal privilege, dependent upon the place where the property lies, and where the court sits, which is to decide the cause."

It is believed to be the rule of the English as well as American courts of Admiralty, after the payment of maritime liens to direct the surplus proceeds to be paid over to any one who may have a lien upon such proceeds by the law of the place where the contract, from which the lien arose, is made; or at least to retain the fund in court until the court of chancery shall have made an order for its distribution : *The Flora*, 1 Hagg, 298. *The Harmonia*, 1 St. Rob. 178. *The Nordstjeruen*, Swab. 260. *The Gustaf*, 6 L. T. (U. S.) 660. But even if the foreign

court should misjudge this question, and hold that by the law of Ohio the libellant had no lien at all upon the vessel, or thould deny his petition for payment from the remnants in court, the sale would not thereby be invalidated, or the vessel remain subject to arrest in this country. This was the precise question decided in *Castrique* v. *Imrie*, L. R. 4 H. L. C. 427. That was an action of trover by the assignee of a mortgagee for the conversion of the ship Ann Martin. Defendant claimed title as purchaser at a judicial sale in France. The question arose whether the proceedings in the civil tribunal were *in personam* or *in rem.* It was held that the sale ordered was not of the interest of the owner in the ship, as upon execution, but of the ship itself; and that such sale divested the title of the plaintiff, although he had set up his mortgage in tne French court, and that court had disallowed it, under a misapprehension of his rights under the English law. In delivering the opinion of the courtof Exchequer Chamber, on appeal from the Common Pleas, Mr. Justice Blackburn remarked: "We think the inquiry is, first, whether the subject matter was so situated as to be within the lawful control of the state under authority of which the court exists; and, secondly, whether the sovereign authority of that state has conferred on the court power to decide as to the disposition of the thing, and the court has acted within its jurisdiction." The judgment of the Exchequer Chamber was affirmed by the House of Lords, their lordships holding that the error of the French court in construing the law of England did not render its judgment void in a foreign country, although it would have been otherwise in a case of fraud, and that they were bound to give it effect, at least so far as to sustain the validity of the sale.

The fact that the vessel in this case was sold for the small sum of $1,000 is due to a multiplicity of causes, amongst others to the uncertainty of the law, but in the absence of fraud it cannot be considered an element in the decision of the case. I am clearly of the opinion that the sale was valid and vested a complete title to the property in the purchaser. The libel must be dismissed.

As the cases of the *Kate Moffatt* and *Gladiator* differ from this only in the fact that libellants' claims were rejected upon the ground that the Maritime Court had no authority to enforce liens which accrued before the passage of the Act creating the court, a like disposition will be made of them.

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS.

(Continued.)

5. Define and distinguish *bottomry* and *respondentia.*

6. Under what circumstances can a corporation be bound by a contract not under seal?

7. What is implied in the sale of the goodwill of a business? What are the rights of the vendor and purchaser respectively?

8. To what extent is a person intrusted with the possession of goods to be deemed by statute to be the owner thereof?

9. What are the rules as to the appropriation of money paid by a debtor to his creditor, where there are several debts?

10. In what cases will the breach of a warranty, given upon a sale of chattels, enable the purchaser to rescind the contract? Apply the law to the sale of a machine with a warranty that it would do certain work in a certain time.

CERTIFICATE OF FITNESS.

Leith's Blackstone—Real Property Statutes.

1. Show clearly the necessity for possession being taken on a conveyance by lease and release, and what kind of possession suffices.

2. Distinguish between corporeal and incorporeal hereditaments as to the mode of their conveyance in former times, and show the termination of the distinction.

3. Give the operative words of a conveyance by which a tenant in tail conveys an estate in fee simple, and that part of the conveyance relating to the protector of the settlement.

4. The wife of a vendor does not join him in the conveyance. At what period will her right to bring an action for dower cease?

5. The purchaser of land dies intestate, leaving a mother and two brothers him surviving. To whom will the land descend under the three periods?

6. What was the decision in Taltarum's case?

7. What is meant by the statute which enacts that no descent cast, discontinuance, or warranty shall toll or defeat any right of entry or action for the recovery of land? Explain the terms used.

8. Within what time must a will be registered? What is the effect on non-registration?

9. Under what circumstances, and to what extent are recitals in deeds, evidence of the facts recited?

10. What are the provisions of our Real Property Limitation Act as to the periods within which actions in respect of easements, must be brought?

EXAMINATION FOR CALL.

Mercantile law—Contracts—Pleading and practice.

1. A Bill of Exchange drawn by A on and accepted by B, payable at the Canadian Bank of Commerce in Toronto, held by that bank, is dishonored. Give a short sketch of all proper and necessary proceedings to be taken on behalf of the bank from dishonor to final judgment against the maker and endorser, mentioning the purport of all statutory enactments relating to such proceedings.

2. A debtor, instead of paying his creditor, directs him to take a bill of a third person, which the creditor does. What effect has this on the original debt? Answer fully.

3. State the five rules given by Byles in regard to the effect given to foreign laws relating to bills of exchange and promissory notes, by English Courts.

4. A partnership firm, consisting of A and B, who owe a debt to C, subsequently take in a new partner D, and accept a bill for the old debt in the name of the new firm. C is cognizant of all the facts. What effect will this have on the acceptance in the hands of C?

5. A chose in action is not assignable. How is this statement varied by Ontario statute? Prior to that statute, in how far were *covenants running with the land* an exception to the rule? Explain fully.

6. State fully the rule in regard to the admissibility of parol evidence of usage, for the purpose of qualifying the sense of a written contract.

7. An agent enters into a contract in his own name. What are the rights of his principal? Answer fully.

8. What exceptions to the rule, that a man cannot give a better title to goods than he has himself, have been created by the Factors' Act?

9. Distinguish between legal and equitable set-off, showing generally the cases in which set-off can effectually be pleaded, with reason for your statements.

10. Define the term *duplicity in pleading*. How is such a fault to be met, and why?

EXAMINATION FOR CALL.

Dart's vendors and purchasers—Walkem on wills—Statutes.

1. Is the liablity of a purchaser from a trustee to see to the application of the purchase money to be determined by reference to the deed creating the trust, or the circumstances existing at the time of the sale? Illustrate your answer.

2. A testator by his will, directed his debts to be paid. Was there formerly, and is there now, any power in any of his representatives to sell the real estate for the purpose of paying the debts? Explain and give authority for your answer.

3. Into what three classes may covenants given by a vendee of lands be divided? What is meant by such covenants running with the land? Do all such covenants always run with the land? Explain fully.

4. Discuss the question whether, in an action upon covenants in a conveyance of land, the value of improvements placed upon the land by the grantee can be recovered as damages.

5. Under what circumstances will the Court of Chancery decree specific performance of a contract for the erection of buildings?

6. Whiteacre and Blackacre are held by A, subject to a mortgage, who conveys the former to B and the latter to C. What are the rights of B and C with reference to the mortgage?

7. What facts have to be proved by the plaintiff in a suit to set aside a voluntary conveyance as fraudulent against creditors? Answer fully.

8. What statutory power has a set or to appoint a protector to the settlement, irrespective of estates in the lands?

9. Under what, if any, circumstances can an executor complete an agreement made by the testator for the sale of lands?

10. What is the law as to alterations or interlineations in a will being taken as part of the will?

FLOTSAM AND JETSAM.

A PASSENGER on a railway in a western State accused one of the Company's servants of stealing his watch. The accused thereupon struck and severely injured him. On further search it appeared that the watch had been in the passenger's pocket all the time, unknown to him. He brought an action against the company for injuries sustained. The jury found for the plaintiff and the Court held that the contract of the company was to safely carry the passenger and to treat him with civility and propriety, and that all of the servants of the company employed upon the train were but representing the defendant company in performing the contract, and that the brakeman was in the line of his duty when on the train and assisting the defendant in performing the contract to safely carry and to civilly treat the passenger, and for the breach of the contract the company was liable.—*Chicago Legal News.*

BRITISH COLUMBIA.—We are indebted to the courtesy of Mr. Justice Crease for a copy of the "Weekly Notes," issued "by authority," in his Province, received too late, however, for notice in this number.

Law Society of Upper Canada.

OSGOODE HALL.

HILARY TERM, 44TH VICT.

During this Term the following gentlemen were called to the Bar.

The names are arranged in the order in which they entered the Society, and not in the order of merit.

George A. Skinner, John Philpot Curran, Reginald Boultbee, Harris Buchanan, Goodwin Gibson, William James Thorley Dickson, James Alexander Allan, Walter Alexander Wilkes, James Harley, William White, Daniel Erastus Sheppard, Wallace Nesbitt, James B. McKillop, Colin Campbell, Phillip Henry Drayton, Thomas C. L. Armstrong, John Doherty, Alexander Dawson, Thomas Dickie Cumberland, J. Gordon Jones.

The following gentlemen were admitted into the Society as Students-at-Law.

GRADUATE.

Henry Gordon Mackenzie.

MATRICULANTS OF UNIVERSITIES.

James M. Knowlson, Edwin Mowat Henry, Edward Wilson Boyd, Reginald Rudgerd Boulton, William Arthur Campbell, Arthur Luke Rundle, Frederick Laing Fraser.

JUNIOR CLASS.

James F. Williamson, John Thacker, Edmund Walker Head Van Allen, Robert George Code, William Robert Smyth, William Nassau Irwin, Edward Herbert Ambrose, George Edgar Martin, John Smith Meek, Archibald McKechnie, William Henry Tweedale, Thomas Francis Johnson, Sidney Chilton Mew burn, George Hutchison Esten, William Lawrence Leslie.

The following gentlemen passed their examination as Articled Clerks.

Albert Wesley Benjamin, John Hambly, James Joseph Berry.

RULES

As to Books and Subjects for Examination, as varied in Hilary Term, 1880.

PRIMARY EXAMINATIONS FOR STUDENTS AND ARTICLED CLERKS.

A Graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such Degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules, and paying the prescribed fees, and

presenting to Convocation his diploma or a proper certificate of his having received his degree.

All other candidates for admission as articled clerks or students-at-law shall give six weeks notice, pay the prescribed fees, and pass a satisfactory examination in the following subjects:—

Students-at-Law.

CLASSICS.

1881.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero in Catilinam, II., III., IV.
- Ovid, Fasti, B. I., vv, 1-300.
- Virgil, Æneid, B. I., vv. 1-304.

1882.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum, (B. G. B. IV. c. 20-36, B. V., c. 8-23.)
- Cicero, Pro Archia.
- Virgil, Æneid, B. II., vv. 1-317.
- Ovid, Heroides, Epistles V. XIII.

1883.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cæsar, Bellum Britannicum.
- Cicero, Pro Archia.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Heroides, Epistles V. XIII.

1884.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Virgil, Æneid, B. V., vv. 1-361
- Ovid, Fasti, B. I., vv. 1-300.
- Cicero, Cato Major.

1885.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations; Euclid, Bb. I., II., III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a selected Poem:—

1881.—Lady of the Lake, with special reference to Cantos V. and VI.

1882.—The Deserted Village.
The Task, B. III.

1883.—Marmion, with special reference to Cantos V. and VI.

1884.—Elegy in a Country Churchyard.
The Traveller.

1885.—Lady of the Lake, with special reference to Canto V.
The Task, B. V.

Articled Clerks.

1881-
- Ovid, Fasti, B. I., vv. 1-300; or,
- Virgil, Æneid, B. II., vv. 1-317.
- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—N. America and Europe.
- Elements of Book-keeping.

Articled Clerks will be examined in the same years the same portions of Ovid or Virgil, as noted above for Students-at-Law, at the option of the candidate.

HISTORY AND GEOGRAPHY.

English History from William III. to George III., inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy, and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose:—

1881.—Emile de Bonnechose, Lazare Hoche.

OR, NATURAL PHILOSOPHY.

Books.—Arnott's Elements of Physics, 7th edition, and Somerville's Physical Geography.

A student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a student-at-law or articled clerk (as the case may be), upon giving the prescribed notice and paying the prescribed fee.

INTERMEDIATE EXAMINATIONS.

The Subjects and Books for the First Intermediate Examination, to be passed in the third year before the final Examination, shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery; O'Sullivan's Manual of Government in Canada; the Dominion and Ontario Statutes relating to Bills of Exchange and Promissory Notes, and Cap. 117, R. S. O., and amending Acts.

The Subjects and Books for the Second Intermediate Examination to be passed in the second year before the Final Examination, shall be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing, (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law; Underhill on Torts; Caps. 49, 95, 107, 108, and 136 of the R. S. O.

FINAL EXAMINATIONS.

FOR CALL.

Blackstone, Vol. I., containing the Introduction and the Rights of Persons, Smith on Contracts, Walkem on Wills, Taylor's Equity Jurisprudence, Harris's Principles of Law, and Books III. and IV. of Broom's Common Law, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Best on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

FOR CERTIFICATE OF FITNESS.

Leith's Blackstone, Taylor on Titles, Smith's Mercantile Law, Taylor's Equity Jurisprudence, Smith on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the Final Examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

The Primary Examinations for Students-at-Law and Articled Clerks will begin on the Second Tuesday before Hilary, Easter, Trinity, and Michaelmas Terms.