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DIARY FOR JULY.

1. Wed .....Dom. Day, 1867. Long Vac., H. C. J., commences.
5. Sun. .....*5th Sunday after Trinity.*
6. Mon. ..... [Court and Surrogate Terms (ex York).
7. Tues.....Col. Simcoe, first Lieut-Gov. U. C. 1792. County
8. Wed .....Cyprus ceded to England, 1878.
11. Sun. .....County Court and Surrogate Term (ex York) end.
12. Sun .....*6th Sunday after Trinity.*
14. Tues.....W. P. Howland, first Lieut-Gov. of Ont., 1868.
15. Wed .....Manitoba entered Confederation, 1870.
17. Fri.....Law Society incorporated, 1797.
19. Sun..... *7th Sunday after Trinity.*
20. Mon. .....British Columbia entered Confederation, 1871.
23 Thur.....Union of Upper and Lower Canada, 1840.
24. Fri.....Canada discovered by Cartier, 1534.
25. Sat.....Battle of Lundy's Lane, 1813.
26. Sun.....*8th Sunday after Trinity.* Jews first admitted to House of Commons, 1858. Dr. Robitaille, Lieut-Gov. of Quebec, 1879.
29. Wed .....First Atlantic telegraph laid, 1866.
30. Thur.....Gov't of U. C. removed from Niagara to York, 1793.

TORONTO, JULY 1, 1885.

THE decision of the Court of Appeal in the cases of *West* v. *Parkdale* and *Carroll* v. *Parkdale* can hardly be said to be satisfactory. The actions were brought to recover compensation for the injury sustained by the plaintiffs as property owners, whose properties were injuriously affected by the construction of the Parkdale subway and were originally tried before Wilson, C. J. The learned Chief-Justice gave judgment (7 Ont. R. 270) in favour of the plaintiffs. This judgment was sustained by Boyd, C., and Proudfoot, J., on appeal to the Divisional Court of the Chancery Division (8. Ont. R. 59). But the Court of Appeal have reversed the judgment, Hagarty, C.J., dissenting. There are thus four judges, including three chiefs, in favour of the plaintiff, and three of the puisne judges in Appeal, Burton, Patterson, and Osler, JJ.A., in favour of the defendants and yet the plaintiff fails. It is not surprising to learn that the cases are to be carried higher.

A VALUED contributor undertakes in another place in this journal to prove that the Ontario Courts have jurisdiction in Manitoba and the North-West. He has set himself what most of us would think rather a hard task, but it must be confessed he has gone about it with great ingenuity and industry. The writer may be correct, but we venture, however, to suggest some of the difficulties which occur to us.

For present purposes we take it for granted that the facts are as he has stated them, and that the Imperial Acts he mentions as still in force have not been expressly repealed. In the first place, however, it must be remembered that as these provisions were made to meet a state of things which has long passed away, and when there were no courts in Manitoba and the N. W. T., the *raison d'etre* of the provisions is gone: *Cessante ratione legis cessat et ipsa lex.* The passing of the Imperial B. N. A. Act; the constitution of the Dominion, and the incorporation of the N. W. T. with it; the passing of the Imperial Act, 34, 35 Vict. c. 28 (authorizing the Parliament of Canada from time to time to establish new provinces in any territories forming part of the Dominion, and to make provision for the administration, peace, order and good government of any territory not included in any province, and confirming the Dominion Acts 32, 33 Vict. c. 3, "for the temporary government of Rupert's Land and the N. W. T. when united with Canada"), and 33 Vict. c. 3. "to establish and provide for the government of the Province of Manitoba;" and the exercise by the Parliament of the Dominion of the powers so vested in it, by passing the Acts respecting the N. W. T., which make provision for the matters

mentioned by our correspondent—seem so inconsistent with the view taken by our correspondent, as to amount to a virtual repeal of the provisions he relies on by an authority acting by and under the express sanction of the same Imperial Parliament which passed the Acts which our correspondent cites.

CRIMINAL JURISDICTION IN THE NORTH-WEST TERRITORY.

In a former number was sketched the jurisdiction of the Local Courts in the North-West Territory to try Riel and the other leaders of the rebellion for treason-felony. A reference to some Imperial statutes giving criminal jurisdiction to the Courts of Upper Canada (now Ontario) in those territories will complete the sketch.

During the period of the Hudson Bay Company's *regime* the Imperial Parliament passed three Acts vesting jurisdiction over criminal offences committed in those territories in the Courts of the older Provinces.

The first was the Act of 1803, 43 Geo. III., c. 138, giving jurisdiction to the Courts of Lower Canada, but authorizing the Lieutenant-Governor of that province, in case it should appear from any of the circumstances of the crime or offence, or the local situation of any of the witnesses for the prosecution or defence, that justice may more conveniently be administered in relation to such crime or offence in the Province of Upper Canada, to issue an instrument under the great seal of Lower Canada authorizing the Court of Upper Canada to try the same.

Under this Act DeReinhard (whose case was frequently referred to during the Ontario Boundary Dispute) was tried in Quebec in May, 1818, for the crime of murder committed at the Dalles, near Rat Portage, now within the Province of Ontario. In October, 1818, under great seal instruments issued by the Lieutenant-Governor of Lower Canada, Brown, McLellan and others were tried in York (now Toronto) for the crime of murder committed at the junction of the Winnipeg and Assiniboine rivers, now within the Province of Manitoba. In 1872 this Act was repealed on the recommendation of the Statute Law Commission.

In 1821 another Act was passed (1 & 2 Geo. IV., c. 66) regulating the fur trade and establishing a criminal and civil jurisdiction within the Hudson Bay and Indian Territories. This Act gave jurisdiction in civil actions arising in the North-West to the Courts of Upper Canada, to which we refer in another article, empowered the Crown to appoint justices of the peace, and, notwithstanding anything in the charter of the Hudson Bay Company, enabled the Crown to authorize such justices of the peace to hold Courts of Record for the trial of criminal offences and misdemeanours, but "not to try any offender upon any charge or indictment for any felony made the subject of capital punishment, or for any offence or passing sentence affecting the life of any offender, or adjudge or cause any offender to suffer capital punishment or transportation."

As to such capital offences, it provided that "in every case of any offence subjecting the person committing the same to capital punishment or transportation, the Court or any judge of any such Court, or any justice or justices of the peace before whom any such offender shall be brought, shall commit such offender to safe custody, and cause such offender to be sent in such custody for trial in the Court of the Province of Upper Canada."

This Act did not go on to provide, as did the Act of 1803, "that every such

offender may and shall be prosecuted and tried in the Court of the Province of Upper Canada." But this defect may perhaps be found to be remedied by the Imperial Act of 1874, 37, 38 Vict. c. 27, which provides:—

"Where by virtue of any Act of Parliament now or hereafter to be passed, a person is tried in a Court of any colony for any crime or offence committed on the high seas, or elsewhere, out of the territorial limits of such colony, and of the local jurisdiction of such Court; or if committed within such local jurisdiction made punishable by that Act; such person shall upon conviction be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony, and of the local jurisdiction of the Court."

By the B. N. A. Act (s. 139) all laws in force in Canada (*i.e.*, Upper and Lower Canada) at the union, and all Courts of civil and criminal jurisdiction were continued in Ontario and Quebec subject (except with respect to such as are enacted by or exist under Imperial Acts) to be repealed or altered by the Dominion Parliament or the Provincial Legislature, according to the authority of the Parliament or Legislature under the B. N. A. Act.

This provision preserves the criminal jurisdiction of the Ontario Courts under the Imperial Act of 1821; and that jurisdiction is not, we think, affected by the "Rupert's Land Act, 1868," 31, 32 Vict. c. 106 (Imp.), which provides that after the admission of Rupert's Land into the Dominion, the Parliament of Canada may make laws and constitute Courts for the peace, order and good government of Her Majesty's subjects and others therein; "Provided that until otherwise enacted by the said Parliament of Canada, all the powers, authorities and jurisdiction of the several Courts of Justice *now established in* Rupert's Land, and of all magistrates and justices now acting within the said limits shall continue in full force and effect therein."

The Ontario Courts cannot be held to come within the definition of "Courts of Justice established in Rupert's Land;" and so the criminal jurisdiction of the Ontario Courts, under the Act of 1821, cannot be held to be affected by this enactment. Besides, unless authorized by an Imperial Act, no Colonial Legislature can vary or repeal Imperial enactments applicable to such colony.

This would appear to be the effect of the Imperial Acts, 7, 8 Wm. III. c. 22, s. 9; 6 Geo. IV. c. 105, s. 56; 3, 4 Wm. IV. c. 59, s. 56; and 28, 29 Vict. c. 63, s. 2, which latter Act condenses the former enactments and declares that Colonial Laws repugnant to any Imperial Act are to be read subject to such Imperial Act, and are "to the extent of such repugnancy, but not otherwise, to be and remain absolutely void and inoperative."

In 1859 another Imperial Act (22, 23 Vict. c. 26) was passed reciting the Acts of 1803 and 1821, and empowering the Crown to authorize justices of the peace appointed under those Acts, to try in a summary way all crimes, and to punish the same by fine or imprisonment or both; but, where the offence was one punishable with death, or should not be disposed of summarily, such justices might commit the offender to safe custody and cause him to be sent in such custody for trial in Upper Canada, as provided in the Imperial Act of 1821. The Act, however, does not extend to "the Hudson Bay Company's Territories."

It would seem, therefore, that in addition to the Local Courts referred to in our former article, a Criminal Court in Ontario, having jurisdiction in capital offences, may try Riel and the other leaders of the

Rebellion for the felonies charged against them—provided "the justice or justices of the peace before whom such offenders shall be brought shall commit such offenders to safe custody, and cause such offenders to be sent in such custody for trial in the Court of the Province of Upper Canada," now Ontario.

Any doubt as to the question of Ontario jurisdiction could be settled by an Act of the Parliament of Canada, passed during the present session dealing with the whole question, but not conflicting with the Imperial statute referred to. A precedent for such an Act may be found in the Upper Canada Acts of 1818 (59 Geo. III. c. 10), under which Lord Selkirk and his co-offenders were indicted by Attorney-General Robinson at the York Assizes of 1819, after the failure of the grand jury of the Western District to return a true bill against them for the misdemeanours committed by them "at Fort William in the Western District of Upper Canada" in 1816.

The Government, however, have apparently thought it best, and probably very wisely under the circumstances, to let these trials for treason-felony proceed under the law as it stands at present, without *ex post facto* legislation, a course to which the prisoners at least can have no reasonable objection. The trial by this forum will, in any case, be a rather more formal affair than a court-martial, which might have been a competent tribunal, so far as Riel and others were concerned, and it will not be so summary as the proceedings of Judge Lynch, who has been so successful in putting down crimes of lesser magnitude, but of similar atrocity, in the western wilds of the United States.

JURISDICTION OF ONTARIO COURTS IN MANITOBA AND THE NORTH-WEST.

[COMMUNICATED.]

The attention of the commercial community has been called to the extraordinary and exceptional provisions of a late Act of the Legislature of Manitoba relating to "exemptions," which seem intended to advertise Manitoba as a safe place of resort and a haven of refuge for the impecunious or dishonest: a kind of "debtor's paradise;" and for the disallowance of which appeals are made in the newspapers, and by Boards of Trade to the Dominion Government.

While the discussion on the propriety or justice of such legislation, and of the exercise of the prerogative of disallowance by the Dominion Government in this case is going on, it may be interesting to creditors of the Manitobans to know that the Courts of Ontario have special jurisdiction in matters of contract, debt and tort—in fact, in all actions of a civil nature—arising in any part of Manitoba and the North-West Territories, by virtue of an Imperial Act of 1821, 1, 2 Geo. III., c. 66, which is still in force. The earlier sections of the Act relate to the Hudson's Bay Company's licenses to trade with the Indians, and the following relate to the jurisdiction of the Ontario Courts:

"6. The courts of judicature now existing, or which may be hereafter established in the Province of Upper Canada, shall have the same civil jurisdiction, power and authority, as well in the cognizance of suits as in the issuing of process, mesne and final, and in all other respects whatsoever within the said Indian Territories and other parts of North America not within the limits of either of the Provinces of Lower and Upper Canada, or of any civil government of the United States,

as the said Courts have or are invested with within the limits of the said Provinces of Lower or Upper Canada respectively; and that all and every contract, agreement, debt, liability and demand whatsoever, made, entered into, incurred, or arising within the said Indian Territories and other parts of America; and all and every wrong and injury to the person, or to property, real or personal, committed or done within the same, shall be, and be deemed to be, of the same nature, and be cognizable by the same Courts, magistrates or justices of the peace, and be tried in the same manner and subject to the same consequences in all respects as if the same had been made, entered into, incurred, arisen, committed or done within the said Province of Upper Canada, any thing in any Act or Acts of Parliament, or grant, or charter to the contrary notwithstanding; provided always, that all such suits and actions relating to lands, or to any claims in respect of lands, not being within the Province of Upper Canada, shall be decided according to the laws of that part of the United Kingdom called England, and shall not be subject to or affected by any local acts, statutes, or laws of the Legislature of Upper Canada.

Section 7 provides that all process, writs, orders, judgments, decrees and acts whatsoever to be issued, made, delivered, given and done, by or under the authority of the said Courts, or either of them, shall have the same force, authority and effect within the said Indian Territories and other parts of America as aforesaid, as the same now have within the said Province of Upper Canada.

And now comes a curious provision. Under a prior Imperial Act of 1803 (43 Geo. III., c. 138, repealed in 1872), the Lieutenant-Governor of Lower Canada was authorized (section 2) to appoint justices of the peace within the Indian Territories. Under this Act of 1821 the Crown was also authorized to appoint justices of the peace within the territories above described. By section 8 of this Act the Lieutenant-Governor of *Lower Canada* may, by commission under his hand and seal, authorize all persons appointed justices of the peace under the Act, "or any other person who may be specially named in any such commission," to act as commissioner within the territories aforesaid "for the purpose of executing, enforcing and carrying into effect, all such process, writs, orders, judgments, decrees and acts which shall be issued, made, delivered, given or done by the said courts of judicature, and which may require to be enforced and executed within the said territories," *i.e.*, the Upper Canada (now Ontario) process, etc.

The section further provides that if any party required to obey such process should resist or oppose the execution of the same, the justice or commissioner may convey, or cause to be conveyed, to Upper Canada such offender or offenders, to be dealt with by the Court there as the Act prescribes.

Another section (s. 10) gives further power to the Upper Canada Courts in the following words:—

"It shall be lawful for the Court in the Province of Upper Canada, in any case in which it shall appear expedient to have any evidence taken by commission, or any facts or issues in any cause or suit ascertained, to issue a commission to any three or more such justices to take such evidence and return the same, or try such issue; and for that purpose to hold Courts and to issue subpœnas or other processes to compel the attendance of plaintiffs, defendants, jurors, witnesses, and all other persons requisite and essential to the execution of the several purposes for which such commission or commissions had issued; and with the like power and

authority as are vested in the Courts of the said Province of Upper Canada; and any order, verdict, judgment or decree, that shall be made, found, declared or published, by or before any Court or Courts held under and by virtue of such commission or commissions, shall be considered to be of as full effect, and enforced in like manner as if the same had been made, found, declared or published, within the jurisdiction of the Court of the said Province.

This Imperial Act, and the jurisdiction it vests in the Courts of Ontario, have not been affected by the "Rupert's Land Act, 1868," nor by the legislation of Manitoba or the Dominion.

The B. N. A. Act, section 129, continues the laws in force in Ontario, and the Courts of civil and criminal jurisdiction there "as if the union had not been made;" subject—except as to such as are enacted by or exist under Imperial Acts—to be altered by the Dominion or Ontario according to their legislative authority under the B. N. A. Act. By section 65 the powers conferred upon the Lieutenant-Governor of Lower Canada by Acts of the Imperial Parliament, may be exercised by the Lieutenant-Governor of Quebec.

The paramount authority of the Imperial Parliament over its statutes applicable to the colonies is preserved by the Imperial Act of 1865, 28, 29 Vict. c. 63, s. 2 (following an old statute of 7, 8 Wm. III., c. 22, s. 9, and later Acts), as follows:—

"Any colonial law which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate . . . shall be read, subject to such Act, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

The practical effect of this Imperial Act of 1821 is that the Courts of Ontario have the right to try and adjudicate upon all rights of action arising in Manitoba and the North-West; but that their writs of execution, issued to realize the fruits of such adjudication, can only be enforced there through commissioners appointed by the Lieutenant-Governor of Quebec, except where the order, verdict, judgment, or decree of the Ontario Commissioners appointed by the Ontario Courts under section 10 are operative, or can be enforced by them without the intervention of the Quebec commissioners.

It will be time enough, when the occasion arises, to discuss whether a Manitoba or North-West Court could enjoin an action brought in an Ontario Court under this Act, or whether the judgment of an Ontario Court in an action "relating to lands or to any claims in respect of lands,"—dower, for instance—decided according to the laws of England, would operate as an estoppel in a similar action relating to the same lands or claims subsequently brought in the Courts of Manitoba or the North-West.

T. H.

RECENT ENGLISH DECISIONS.

The June numbers of the *Law Reports* comprise 14 Q. B. D. pp. 837-976; 10 P. D. pp. 97-114; 29 Ch. D. pp. 1-253; 10 App. Cas. pp. 147-353.

COSTS—ACTION IN FORMA PAUPERIS.

The case of *Carson* v. *Pickersgill* (14 Q. B. D. 859), to which we first propose to refer, is a decision of the Court of Appeal touching the quantum of costs recoverable by a successful plaintiff who has sued in *forma pauperis*. Although the case turned on the construction of the English Judicature Rules, Ord. 16 rr. 24, 25, 26, 27, 31, it is useful for reference as containing a review of the practice on the subject both at law and in equity prior to

the Judicature Act. The question was whether the plaintiff who had succeeded was entitled to recover full costs from the defendant, or merely pauper costs, *i.e.*, costs out of pocket and of witnesses, and the Court determined that only pauper costs were, under the Rules, now recoverable, although it had formerly been the practice in Chancery to award "dives' costs" in such a case.

Under our Rule 428 the whole question of costs seems to be left, subject to the exceptions mentioned in that Rule, to the discretion of the judge.

INTERPLEADER BY SHERIFF — MONEY PAID TO SHERIFF UNDER PROTEST TO RELEASE GOODS.

The next case, *Smith* v. *Critchfield* (14 Q. B. D. 873), is a decision of the Court of Appeal on a question of interpleader law. A sheriff had seized, on a third person's land, certain goods as the property of the execution debtor; the person on whose land the goods were seized claimed them as his own, and under protest paid the amount to be levied to the sheriff in order to release the goods from execution, and the question was whether the sheriff could interplead as to the money so paid him, and whether he was entitled to protection from any action for trespass on the land on which the goods were seized.

Ord. 57, r. 1, provides "that relief by way of interpleader may be granted where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and a claim is made to any money, goods, or chattels taken, or intended to be taken, in execution under any process, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued. The Court held that the money in question came within the terms of 'money taken in execution,' and therefore that the sheriff was entitled to interplead in respect of it; and following *Winter* v. *Bartholomew* (11 Ex. 704), the Court held that no substantial grievance beyond the entry and seizure of the goods having been sustained by the third party in respect of the trespass to the land, the sheriff was entitled to protection from action in respect of such trespass.

DAMAGES—NEGLECT OF COMPANY TO REGISTER TRANSFER OF SHARES.

The next case which we come to is that of *Skinner* v. *The City of London Marine Insurance Corporation* (14 Q. B. D. 882), in which the plaintiff claimed to recover damages against the defendants for not registering a transfer of shares made by the plaintiff. The transfer on its face purported to be made in consideration of five shillings, but the transferee had agreed that the shares should be taken at their market value on the day of the registration of the transfer, in reduction of a debt due by the plaintiff to the transferee, but this agreement was not communicated to the defendants. For eighteen months the defendants wrongfully refused to register the transfer. In the meantime the value of the shares depreciated, and the plaintiff claimed to recover as damages the loss occasioned by the depreciation of the shares; but the Court held that the plaintiff was only entitled to nominal damages. Brett, M.R., held that the company were only liable to such damages as would result from an ordinary contract by a seller of registered shares of a company, and that contract he defined to be "that the seller shall execute a valid transfer of the shares and hand the same over to the transferee, and so do all that is necessary to enable the transferee to insist with the company on his right to be registered a member in respect of such shares;" and Baggallay, L.J., thus stated the damages which would probably be the result of such refusal to register: "The plaintiff, by reason of his name remaining on the register of members might become liable for calls after-

wards made, or to contribute on the winding up of the company;" and the fact that the defendants had no notice of the special agreement between the plaintiff and his transferee, was held to exonerate them from liability for the special damage the plaintiff had sustained.

Master and servant—Negligence of servant hired to drive cart—Liability of hirer of.

The case of *Jones* v. *The Corporation of Liverpool* (14 Q. B. D. 890) was one in which the Court applied the rule laid down in the well-known case of *Quarman* v. *Burnett* (6 M. & W. 499). The action was brought to recover damages for injuries to the plaintiff's carriage, caused by the negligence of a driver of a water-cart employed to water the public streets. The water-cart belonged to the defendants, but the driver and horse were hired by the defendants from a Mrs. Dean. The Court (Grove and Manisty, J.J.,) held the case to be exactly covered by the decision in *Quarman* v. *Burnett*, and therefore that the defendants were not responsible for the driver's negligence. Grove, J., thought the distinction between hiring, and borrowing, another person's servant, might be this: "When a driver is hired the person from whom he is hired is bound to exercise due care in selecting a man of proper skill and conduct; but it is otherwise with the lender for no reward of a servant. The person who borrows takes him *cum onere*, and is liable for his negligence whilst in the borrower's employment."

Municipal office—Resignation of member elect.

The next case we come to, *The Queen* v. *Corporation of Wigan* (14 Q. B. D. 908), involves a question of municipal law, turning on the construction of the Imperial Statute 45 and 46 Vict. c. 50, s. 36, which provides as follows:—(1) A person elected to a corporate office may at any time, by writing signed by him and delivered to the town clerk, resign the office on payment of the fine provided for non-acceptance thereof. (2) In any such case the council shall forthwith declare the office to be vacant, and signify the same by notice in writing, signed by three members of the council and countersigned by the town clerk, and fixed in the town hall, and the office shall thereupon become vacant. A. W. Ackerley who had been elected a common councillor, had written a letter of resignation and given his cheque for the prescribed fine, which had not been cashed. Subsequently he applied to withdraw his resignation, and a resolution was passed by the council refusing to accept his resignation. A rule for a mandamus to the council to command them to declare Mr. Ackerley's seat vacant was granted, which, after argument before the Court (Matthew and Smith, J.J.), was made absolute. Matthew, J., said:—"In my judgment the resignation of Mr. Ackerley's office had been completed. The only conditions required for the resignation—that a writing signed by the officer should be delivered to the town clerk, and that the fine for non-acceptance should be paid—had been fulfilled, and by s. 36, after this has been done, the council are forthwith to declare the office to be vacant."

Municipal contract—Affixing seal after contract partly performed.

The case of *Meliss* v. *Shirley* (14 Q. B. D. 911), though turning to some extent on the construction of an Act of Parliament, we deem to be of importance as illustrating a general principle of the law of contracts with corporations. The Act in question required every contract made by an urban authority, whereof the value or amount exceeded £50, to be under seal. The defendants, an urban authority, by contract not under seal employed the plaintiffs as engineers to perform certain work. The plaintiffs performed part of the work exceeding £50, and then required defendants to affix their seal to

the contract which they did, believing it to be for the benefit of the ratepayers that the work should be finished. Under these circumstances Cave, J., held the contract to be valid. He observes, p. 915: "Whatever the result in point of law might be if the seal had not been affixed until all the work under the contract had been done (upon which I offer no opinion), it appears to me that whilst the contract was still open, it may be fairly contended that it was to the defendant's advantage that the contract should be carried out in its integrity, and if so, that it was competent to the defendants to affix their seal and make the contract good."

Another point in the case was this: the Act in question prohibited officers of the corporation being concerned or interested in any contract or bargain made with the corporation, and provided that in case any officer should be so interested he should be incapable of afterwards holding or continuing in office, and should forfeit £50; and the question raised was whether the contract was also invalid when an officer was interested in it; and the learned judge held that the contract was not thereby made void. The general rule of construction he held to be this: "Where the legislature has prohibited a thing from being done under a penalty you must look at the purview and surrounding sections of the Act in order to see whether the effect of the prohibition is to render the act done void; or whether the legislature intended the penalty for doing it should be confined to that expressly declared by the statute." Applying this principle, he came to the conclusion that the consequences of holding that the contract was void would be so tremendous, and the penalty so out of proportion to the offence, that it would require strong language in the Act to make him come to the conclusion that the legislature intended these consequences.

NEGLIGENCE—DIVERSION OF WAY—DUTY TO FENCE.

The next case of *Hurst* v. *Taylor* (14 Q. B. D. 918), was an action to recover damages alleged to have been sustained through the defendant's negligence in not fencing a path which they had diverted under statutory powers. The point in controversy is shortly stated by Manisty, J., thus: "The question which lies at the root of the case is whether or not, when a person exercising statutory rights diverts a public foot-path, shutting up part of it and substituting a new path for that part, there is duty on him so to construct the diversion that the public may use the foot-path in its diverted condition with reasonable safety." This question the Court answer in the affirmative. Lopes, J., the other member of the Court, said: "This case raises a novel point upon which there is no authority, but which can, I think, be decided upon general principles of law applicable to negligence. The law appears to me this: if a reasonably careful man might go astray in the dark at the point of diversion, then a duty is imposed upon those who under statutory powers have diverted the path, to use reasonable means to protect the public at that point."

NUISANCE—MANDATORY INJUNCTION—COMPENSATION.

In *Sellors* v. *Matlock* (14 Q. B. D. 928), we have a decision of Denman, J., upon a question of municipal law which is worth noting. An urban authority under a statute empowering them, if they should think fit, to provide and maintain, in proper and convenient situations, urinals, water-closets, etc., and other similar conveniences for public accommodation, had erected on the plaintiff's land a public urinal, which was proved to be a nuisance and injurious to the business carried on on the plaintiff's premises on which was situated a petrifying well, where barristers' wigs and other interesting objects were turned into stone. The Court held, that being a nuisance, its erection was not

justified by the statute, and a mandatory injunction for its removal was granted; and it was held that for such an injury the plaintiff was not bound to seek compensation, under a clause in the Act providing for making compensation to persons who should sustain any damage by reason of the exercise of any of the powers of the Act. Denman, J., says, at p. 934: "It was also contended that s. 308 applied, and that the remedy was by compensation and not by action. This would be so if the Act contained any powers for the board to erect urinals upon private ground, but there are none. Nor do I think it can be contended, after the decision in *Vernon* v. *St. James, Westminster* (16 Ch. D. 449), though decided upon somewhat different language, that the power given by s. 39 of the Act of 1875, to erect urinals 'in proper and convenient places,' carries with it a right to create a nuisance without being liable to an action."

In the Probate Division the only case we think worth noting is on

Costs—Discretion of Court.

The case is that of *The Friedeberg* (10 P. D. 112), in which the Court of Appeal held that under Ord. 65, r. 1 (Ont. R. 428) the costs of all proceedings are now in the discretion of the Court, and therefore the general rule of practice which had previously prevailed in the Admiralty Court as to the costs of references, viz., that when more than one-fourth is struck off a claim each party pays his own costs, and when more than a third the claimant pays the other party's costs, is no longer in force, and that the Court must now exercise its discretion according to the circumstances of each particular case. The case is noteworthy for the fact that Brett, M.R., declared that the rule in question was not only not in force, but was originally wrong, because the judge who laid it down attempted thereby to fetter his own discretion and that of his successors, which he had no legal power to do.

THE EDITOR OF THE LAW REPORTS.

It was doubtless with extreme regret that the Benchers of the Law Society received the resignation of the first Editor-in-chief of the Ontario Law Reports.

Mr. Christopher Robinson began his experience as a legal reporter in 1852, though he was not actually appointed reporter to the Court of Queen's Bench until between four and five years afterwards, then taking the position of his brother, Mr. James Lukin Robinson.

When the system was introduced in 1872 of having an increased staff of editors, with an editor-in-chief to oversee their work and be responsible to Convocation that the work was efficiently and promptly done, Mr. Robinson was naturally chosen to fill that responsible office.

As a reporter, and more recently as editor-in-chief of the reports, as in everything else he has undertaken, Mr. Robinson has done his work with a skill, an accuracy, a conscientious faithfulness and a courteous kindliness that has won him a reputation of which any man might be proud. Few except those who have worked under him know how true this is.

His resignation is a serious loss to the profession, and his successor, no matter how good he may prove to be, will find it difficult to fill the place of one so competent, so conscientious, and of such great experience as Mr. Robinson. We refer particularly to the conscientious discharge of the duties of this office, for we know of no position where the work could be slurred over with so little chance of detection, and where there is so little to show for the time and thought expended.

We believe that in Mr. James F. Smith the Benchers have secured the services of one who may be thoroughly relied upon in this regard, and we have reason to think that he is in other respects well qualified for the duties of the office.

LAW SOCIETY.

EASTER TERM, 1885.

The following is the resumé of the proceedings of the Benchers, published by authority:—

During this term the following gentlemen were called to the Bar, namely:—

Messrs. Donald Malcolm McIntyre, with honours and gold medal; Robert Smith, John Macpherson, William Edward Middleton, John Tytler, Robert William Evans, Robert Victor Sinclair, Ernest Joseph Beaumont, James Redmond O'Reilly, George Eldon Kidd, James Chisholm, Robert Ormiston Kilgour, William Avery Bishop, Francis Gilbert Lilly, Donald Macdonald, William Beardsley Raymond, Christopher Conway Robinson, Charles Creighton Ross, John Thomas Sproule, Arthur Byron McBride. These names are arranged in the order in which the candidates appeared before Convocation for call.

The following gentlemen were granted Certificates of Fitness as Solicitors, namely:—R. Smith, A. B. McBride, F. W. Thistlethwaite, C. F. Farewell, J. R. O'Reilly, D. W. Saunders, S. O. Richards, D. Macdonald, J. Tytler, A. G. Campbell, J. Macpherson, A. C. Rutherford, H. V. Greene, G. E. Evans, W. J. Church, L. H. Patten, R. N. Ball, J. S. Garvin, T. Johnson, G. E. Kidd, A. A. Mahaffy, A. K. Goodman, H. T. Shibley, D. R. Davis, J. R. Miller, T. I. F. Hilliard, C. R. Irvine, H. Cowan, W. Masson, G. Bolster.

The following gentlemen passed their First Intermediate Examination, viz.:—G. W. Holmes with honours, first scholarship; W. P. Torrance with honours, second scholarship; W. L. Scott with honours, third scholarship; Messrs. L. W. F. Berkeley, H. H. Langton, W. C. P. McGovern, W. S. Hall and J. A. Page, with honours; and J. E. Kirkland, F. M. Field, A. B. Bartlett, J. R. Code, J. M. Balderson, R. A. Grant, A. Stevenson, J. T. Doyle, W. D. Gregory, J. E. Hansford, S. W. Broad, W. L. M. Lindsey, C. A. Ghent, T. M. Bowman, R. R. Bruce, J. M. Mussen, W. W. Jones, C. A. Blanchet, G. F. Henderson, H. M. Cleland, W. G. Burns, H. D. Cowan, E. E. L. Pilsworth, A. E. Trow.

The following gentlemen passed their Second Intermediate Examination, viz.:—R. H. Collins, with honours and first scholarship; J. M. Clark, with honours and second scholarship; and Messrs. J. S. Campbell, J. F. Cryer, John Clark, H. E. Ridley, J. H. Bobier, D. A. Givens, R. F. Sutherland, J. D. O'Neill, D. H. Cole, A. D. McLaren, A. C. F. Boulton, G. F. Burton, S. C. Mewburn, E. W. Morphy, O. L. Spencer.

The following candidates were admitted as students-at-law, namely:—

Graduates — Alexander Gray Farrell, William Henry Williams, Herbert Read Welton.

Matriculants — Samuel Storm Martin, James Henry Cooper.

Juniors—J. A. Fleming, W. G. Richards, R. M. Graham, J. P. Dunlop, W. G. Green, J. D. Lamont, C. Stiles, J. H. Denton, W. J. Whiteside, S. B. Arnold, W. Kennedy, J. R. Layton, W. L. Hatton, W. J. Williams, H. Armstrong, H. W. Ross, R. G. Pegley, A. H. Wallbridge, M. K. Cowan, J. J. Drew, M. Murdoch, G. H. Muntz, C. E. Lyons and F. C. Hastings.

MONDAY, 18TH MAY.

Convocation met.

Present — Messrs. Maclennan, Read, Moss, Foy, Morris, Ferguson, Osler, Hoskin, Irving, J. F. Smith, Martin, Murray, Mackelcan.

In the absence of the Treasurer, Mr. Irving was elected Chairman.

The various reports of the examiners and secretary in relation to the several examinations were received, considered and adopted.

Mr. Robinson's letter of 18th inst., upon the subject of editing the reports, was referred to the Reporting Committee for report to Convocation.

The petition of Mr. R. W. Evans was referred to the Legal Education Committee.

The report of the Legal Education Committee on the cases of Messrs. McCullough, Yarwood, Carson, Young, Helliwell, was received, read and adopted.

The report of the Legal Education Committee as to the legislation of last session of the Ontario Legislature on the subject of admission of members of the Bar of England, Ireland and Scotland, was received and adopted.

The report of the Legal Education Committee upon the subject of the primary examinations and curriculum therefor, was received, read and adopted.

The report of the examiners on the case of Mr. Masson was received and adopted.

The report of the Examiners on the Law School for session 1884–85 was received, and ordered for consideration on Saturday next.

The report of the County Libraries Aid Committee was received and read. Ordered for consideration on Saturday, the Finance Committee to report thereon as to application of Lindsay Association.

Letters were read from Messrs. Langtry and Eddis upon the subject of the volunteers who were members of the Law Society but not yet called to the Bar.

TUESDAY, 19TH MAY.

Convocation met.

Present — Messrs. Mackelcan, J. F. Smith, McCarthy, Ferguson, Foy, Morris, S. H. Blake, Kerr, Murray, Read.

In the absence of the treasurer, Mr. Mackelcan was elected chairman.

The report of the Legal Education Committee on the cases of Messrs. Evans, Mahaffy, McMillan, Hilliard, Miller, Goodman, Shibley, was received, ordered for immediate consideration, and adopted in so far as the same related to the cases of Messrs. Evans, Mahaffy, McMillan, Goodman and Shibley; and as to the cases of Messrs. Hilliard and Miller, the report was referred back to the Committee for further consideration, with instructions to report generally as to the rule to be followed in such cases.

A communication was read from H. R. Hardy asking for a grant of $100 towards the publication of a law list. It was decided to take no action in the matter.

Ordered, That all members of the Society who had given notice of their intention to present themselves for call or for admission during the present term, and who have been prevented from so doing by reason of absence upon military service in the North-West, be called to the Bar or admitted, as the case may be, without further examination and without payment of fees, upon complying with the other rules of the Society.

Ordered, That all students-at-law and articled clerks who are on active military service shall be allowed the time during which they have been or may be absent from their offices; and also any examinations which may intervene and for which they might have presented themselves while on such service.

It was ordered that Mr. Delos R. Davis receive his certificate of fitness as a solicitor.

SATURDAY, 23RD MAY.

Convocation met.

Present—Messrs. Maclennan, Moss, J. F. Smith, Martin, Murray, Hardy, Irving, Ferguson, Osler.

Mr. Irving was elected chairman in the absence of the treasurer.

Hon. E. Blake, Q.C., was re-elected treasurer for current year.

A letter from Mr. Read, Q.C., tendering the resignation of his position as Bencher, was read. It was moved by Mr. Hardy, seconded by Mr. Maclennan, that Convocation regret that Mr. Read should contemplate retiring from a position in which his valuable services and long experience are, and have been, of great value, and direct that the secretary do write requesting him to withdraw his resignation.

The report of the Legal Education Committee on the cases of Messrs. Miller and Hilliard was received, read and adopted.

It was ordered that during the present illness of the secretary, Mr. C. B. Grasett countersign the Certificates of Fitness ordered to issue.

The report of the Finance Committee relating to the grant to the Lindsay Law Library Association was received and adopted.

The report of the County Libraries Aid Committee, which had been presented on Monday last, was adopted.

Mr. Maclennan presented the report of the Reporting Committee, which was received and adopted.

The petition of Mr. O. L. Spencer, a captain in the Grenadiers, was received.

Ordered, That Mr. Spencer's Second Intermediate Examination be allowed, his case coming within the resolution passed by Convocation on the 19th inst.

The report of the Special Committee for striking Standing Committees recommended the following names, was received and adopted.

STANDING COMMITTEES.

Legal Education—J. Crickmore, J. H. Ferguson, D. Guthrie, J. Hoskin, J. H. Morris, C. Moss, F. Mackelcan, J. F. Smith, W. R. Meredith.

Library—J. Beaty, J. Bell, Hon. S. H. Blake, H. Cameron, J. H. Ferguson, Æ. Irving, C. Moss, Dr. McMichael, J. H. Morris.

Discipline— J. Beaty, J. Hoskin, A. Hudspeth, J. K. Kerr, F. Mackelcan, J. Maclennan, Dr. McMichael, T. Robertson, L. W. Smith, D.C.L.

Finance—Hon. S. H. Blake, Æ. Irving, J. J. Foy, Hon. A. S. Hardy, E. Martin, W. R. Meredith, H. W. M. Murray, D. B. Read, L. W. Smith, D.C.L.

Reporting—B. M. Britton, H, Cameron, E. Martin, H. W. M. Murray, J. Maclennan, D. McCarthy, F. Mackelcan, J. F. Smith, B. B. Osler.

County Libraries Aid—B. M. Britton, H. Cameron, D. Guthrie, Hon. A. S. Hardy, A. Hudspeth, J. K. Kerr, E. Martin, W. R. Meredith, T. Robertson.

Journals of Convocation—B. M. Britton, J. Foy, Hon. C. F. Fraser, J. Hoskin, J. K. Kerr, C. Moss, D. McCarthy, J. Maclennan, Hon. T. B. Pardee.

The petition of Delos R. Davis was presented, when it was ordered that $160 be refunded him.

Pursuant to notice Mr. Moss moved,—That the Curriculum for Primary Examinations for the years 1886-1890, inclusive, be amended by adding to the English subjects for 1886 the following: "Or Ancient Mariner and Ode to the Departing Year; France, an Ode; Dejection, an Ode; To William Wordsworth, Youth and Age."

Pursuant to notice a Rule amending a Rule of 26th December, 1882, was read a first and second time, and ordered for a third reading on Friday the 29th May next.

Pursuant to notice Mr. Moss moved,—That the following be a Rule of this Society:—

Any graduate in the Faculty of Arts in any university in Her Majesty's Dominions empowered to grant such degrees, who has given four weeks notice in accordance with the existing rules, and has otherwise complied with the rules of the Society, may, upon presenting to Convocation, at its meeting on the last Tuesday in June in any year, his diploma, or a proper certificate of his having received his degree, be admitted on the books of the Society as a student-at-law, and such admission shall be taken to be as on the first Monday of Easter Term.

The Rule was read a first and second time, and ordered for a third reading on Friday, 29th May next.

Mr. Moss gave notice that at the next meeting of Convocation he would introduce a Rule as follows:—

From and after the day of 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice or employment of a solicitor.

Convocation adjourned.

FRIDAY, 29TH MAY.

Convocation met.

Present — Messrs. Robertson, Crickmore, Moss, Mackelcan, Morris, Britton, Irving, Murray, Guthrie, Maclennan, J. F. Smith, L. W. Smith, Foy.

In the absence of the treasurer Mr. Irving was elected chairman.

Mr. J. Baldwin Hand's petition was received and it was ordered that the prayer of the petition be not granted.

Mr. Maclennan presented the report relating to honours and medals on the Call, and honours and scholarships on the First and Second Intermediate Examinations.

The report was received and adopted.

A letter was read from Mr. Read in reply to the secretary's letter requesting him to withdraw his resignation in which he says that he had in contemplation resigning for some time, and only postponed doing so till this term, an anniversary term of his call to the Bar, and he adheres to his resignation.

Convocation having had under consideration Mr. Read's letter tendering his resignation of his position of Bencher, with feelings of great regret accept his resignation. Whereupon it was ordered that a call of the Bench be made for the election

of a Bencher in Mr. Read's stead for Tuesday, 8th September.

A letter from Mr. W. Stephens was read and the secretary directed to say that his case did not come within the resolutions adopted by Convocation.

The Report of the Law School was considered and it was ordered that as the required number of students did not present themselves for examination no prizes could be awarded.

The Rule relating to Rule of 26th December, 1882, was read a third time and passed as follows:—

That section 4 of the Rules for Examinations passed on the 26th December, 1882, be amended by inserting the words "at least 29 per cent. of the marks obtainable on the paper on each subject and" between the words "obtain" and "at least," where these words first occur in the second section.

The secretary was directed to have the said Rule published in The Law Journal.

The Rule, as read a first and second time at the last meeting, relating to graduates was then read a third time and passed.

Pursuant to notice a Rule relating to persons engaging themselves in employment other than the employment of articled clerks during the term of their articles, was read a first and second time and ordered for a third reading on Saturday, 6th June.

Convocation rose.

SATURDAY, 6TH JUNE.

Convocation met.

Present—Messrs. Murray, J. F. Smith, Ferguson, Morris, S. H. Blake, Meredith, Irving, Maclennan, Moss, Osler.

In the absence of the treasurer Mr. Irving was elected chairman.

The letter of the treasurer dated 2nd June, 1885, in reference to his recent re-election as treasurer was received and read.

Mr. J. F. Smith presented the report relating to Mr. A. B. McBride which was received and adopted. Ordered that Mr. McBride be called to the Bar. Mr. McBride attended and was called to the Bar accordingly.

The secretary having reported that Wm. Masson had completed his service and was entitled to his certificate, it was ordered that he receive his certificate of fitness.

The Report of the Legal Education Committee on the case of Mr. G. A. Payne was received and adopted, and his examination allowed.

Mr. Maclennan from the Reporting Committee reported as follows:—

1. Your committee have had contracts prepared with Mr. O'Brien of the Law Journal, and Carswell & Co. of the *Law Times* for the publication of early notes on the terms directed by Convocation, and for a period of one year from the first day of July, and afterwards, subject to determination by either party on three months' notice.

2. Your committee have had under consideration the subject of an appropriation asked for by the editor towards the preparation of the next triennial digest, and recommend that the sum of $1,000 be appropriated for that purpose to be applied by the editor in procuring any assistance he may think necessary, and to be paid when the digest is issued, the responsibility for the work to remain, as at present, with the editor and reporters.

3. The reporting work is not going well forward as on some former occasions.

In the Queen's Bench Division there are nine cases unissued all of a date prior to the thirteenth day of March. In the Common Pleas Division there are twenty-seven cases not issued of which one was delivered in August and four in December, 1884, two in January, sixteen in February and four in March last. In the Chancery Division, although a large amount of work has been done, the arrears are not yet quite worked off. With Mr. Lefroy there are thirty-eight cases unpublished and with Mr. Boomer twenty-four, about one quarter of which belongs to the year 1884. The Practice Reports are fairly well up; there are forty-four cases unpublished of which only eleven are older than March last. Complaints have been made to your Committee of some mistakes and inaccuracies in these reports, and the Committee think the complaints, to a certain extent, well founded. Your Committee think that some of the other reports would be improved by greater care on the part of the reporters. Your Committee regret to say that they have received no return from the reporter of the Court of Appeal during the present term, although specially requested to send it in. From his former returns and from those of the printers

your Committee find that there are eleven appeal cases in the hands of the printers, but not yet published, of a date prior to November, 1884. There appear to be only two other cases in that Court yet given to the printer, and of the cases named in the reporter's return for last term it appears that there are twenty-six judgments given in and prior to January last, not one of which has yet been given to the printer. Your Committee have no means in the absence of any return of knowing how many judgments have been given since January, but it is well known there are a good many. Mr. Grant has issued one number in November, one in December, one in February and one in May of 560 pages in seven months. The last two numbers contain eleven cases, and at the same rate it would take fourteen months longer to issue all the cases to the end of 1884.

The report was received and adopted.

The secretary reported that H. C. R. Becher, Q.C., Hon T. B. Pardee, Q.C., and Hon. A. S. Hardy, Q.C., had not attended meetings of Convocation for the last three consecutive terms.

Ordered that a call of the Bench be made for the first Tuesday of Trinity Term for the election of Benchers in the places of Messrs. Becher, Pardee and Hardy.

Mr. Maclennan from Joint Committee of Finance and Reporting reported as follows upon the subject of Mr. Robinson's letter:—

The Joint Committee composed of the Finance and Reporting Committees to whom was referred Mr. Robinson's letter of 18th instant on the subject of an increase of salary for the editor-in-chief beg leave to report as follows:—

The Committee are of the opinion that the funds of the Society do not admit of any considerable permanent increase of expenditure without a very pressing necessity.

The Committee are further of opinion that the salary at present attached to the office of editor-in-chief is sufficient as long as the reporters do the work prescribed by the Rules of the Society.

Your Committee refer to Rules 143, 144, and 145 which intend that the actual execution of the reports is the duty of the reporters, and that the duty of the editor is one of oversight.

Your Committee have communicated with Mr. Robinson with the view, if possible, of retaining his services as editor upon the footing of his labours being reduced to that of oversight and supervision as contemplated by the Rules; but your Committee regret to say that for various reasons Mr. Robinson cannot see his way to do this.

Your Committee therefore recommend that applications for the position of editor-in-chief be advertised for in the usual manner, and that Mr. Robinson be requested to retain his office until his successor is appointed.

The report was received and adopted.

The secretary was directed to communicate to Mr. Robinson that part of the third paragraph relating to his letter.

It was ordered that the usual notice for applications for editor-in-chief be published, and that the usual notice be given to every Bencher for Tuesday, 30th June.

The petition of Gerald Bolster was presented and considered. Ordered, That his certificate of fitness be allowed him, and that the usual fee be not charged.

A resolution was carried respecting Mr. Grant's neglect to make any return during the present term of his reporting work, and the backward condition of the Appeal Reports.

The secretary was directed to communicate the same to Mr. Grant forthwith.

Convocation requested the Finance Committee to take into consideration the system of ventilation of the library, and also the condition of the ceiling.

The Rule, moved by Mr. Moss at last meeting and read twice, relating to service of articled clerks, was read a third time and passed.

Mr. Morris was placed on the Finance Committee in the room of Mr. Read.

Mr. Osler gave notice of motion for the first day of Trinity Term for the formation of a branch library at the Court House for the use of the profession.

J. K. KERR.

Chairman of Committee on Journals.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Proudfoot, J.] [Dec. 2.

VICKERS EXPRESS CO. v. CANADIAN PACIFIC RAILWAY CO.

Railway Act, 1879—*Express Co.*—*Facilities*—*Parties.*

In an action by an express company against a railway company to compel the defendants to afford the plaintiffs the same "facilities" that they did to another express company, alleging that the right to employ the station agents of the railway company as agents of the express company was such a "facility," and had been refused to the plaintiffs although granted to the other express company,

Held, that such right was a "facility," and that the Canada Railway Act of 1879, s. 60, ss. 3, provides any facilities granted to one incorporated express company shall be granted to others.

Held, also, that the plaintiffs could not compel the defendants to give the use of their agents, but if the defendants allow the agents to act for one company, it is a "facility" that cannot be denied to the other company.

The action was, however, dismissed on the ground that the other express company had not been made a party, but without costs.

McCarthy, Q.C., and *Creelman*, for the plaintiffs.

S. H. Blake, Q.C., and *R. M. Wells*, Q.C., for the defendants.

Ferguson, J.] [May 16.

WHITLEY v. GOWDEY.

Patent—Re-issues—Enlarging claims—Laches in applying for re-issue.

Action for infringement of patents of invention. When it appeared that in a re-issued patent a claim constituting a new feature was introduced—a thing that was not in the original patent or contemplated at all by the then inventor—a feature that was shown to be of substantial importance and practical utility and which amounted to an invention and it did not appear that this change was the correction of a mistake or a thing arising by reason of accident or inadvertence.

Held, that the said claim in the re-issue was invalid.

A re-issue cannot contain matter of invention which as to the original is new, or a broadening of the invention, although it may under proper circumstances contain a broadening of a specific claim made.

Where in a re-issue one of the claims was in the same words as one of the claims in the original patent, but contained the words "substantially as shown and described," and on reference to the specifications it appeared that those of the re-issued patent contained certain additions which were not in those of the original patent, and when read with reference to the specifications the claim in the re-issued patent appeared to mean a thing different from that meant by the corresponding claims in the original patent, and the result stated in the new or added part of the specifications for the re-issued patent showed that the intention was to claim something different from that which was manifested or claimed in the original patent, and it did not appear that this change could be said to have been made for the purpose of correcting a mistake or by reason of an accident or inadvertence,

Held, the claim in the re-issued patent could not be sustained, and was invalid.

When the date of an original patent was December 6th, 1877, and the date of a re-issue of it was March 7th, 1881, and it appeared that the attention of the patentee must have been called to the merits and actual scope of his patent as early as March 7th, 1879, by reason of the disclaimer on that date; and when in the case of another patent, the date of the original was November 14th, 1876, and the date of the re-issue March 17th, 1881, and it appeared that the attention of the patentee must have been drawn towards the merits, demerits or defects in his patent as early as March 7th, 1879, for a similar reason; and when in the case of another patent, the date of the original was September 28th, 1876, and of

the re-issue July 10th, 1880, and from the correspondence and proceedings respecting the application in the United States, it was indicated that the patentee was not during at least the larger part of this period without having his attention drawn towards the merits, demerits or defects in his patents; and it also appeared that in each case there had been in the re-issues either the introduction of new inventions or what has been called an enlarging of the scope of the patent, or a broadening of the claim,

Held, that the rule of laches must be strictly applied and the delay being unaccounted for, the re-issues were invalid, at all events as to the claims in the re-issues which constituted such a broadening and enlarging of the claims in the original patents respectively.

W. Cassels, Q.C., for the plaintiff.

B. B. Osler Q.C., and *T. S. Plumb*, for the defendants.

Proudfoot and Ferguson, J.J.] [May 21.

THOMPSON v. CANADA FIRE AND MARINE INSURANCE CO.

Directors' consent to transfer of stock—Absence of fraud.

On appeal from the judgment of BOYD, C. (*ante*, 22 C. L. J., 70),

Held, that as the transfers complained of were within the scope and power of a board of directors, and being found upon the evidence to have been made without fraud, the appeal should be allowed and the action dismissed with costs.

McKelcan, Q.C., and *Moss*, Q.C., for the appeal.

McCarthy, Q.C., and *Nesbitt*, contra.

Boyd, C.] [June 2.

VICKERS EXPRESS CO. v. CANADIAN PACIFIC RAILWAY CO.

Railway Act, 1879—*Express companies—Reasonableness of rates—Facilities.*

In an action by an express company against a railway company and another express company to whom certain privileges were granted by the railway company which were withheld from the plaintiffs, the principal one being that of employing the railway station agents to act as agents of the express company, and in which it was claimed that the Court should inquire into and settle whether the rates charged by the railway company were reasonable or not,

Held, that even if the Court had jurisdiction to inquire into the reasonableness of the rates, which was doubtful, no collusion being shown between the defendant companies it would not on the record and evidence in this case do so.

Held, also, that the employment of the station agents of the railway company to act as agents of the express companies with the privileges they had at the stations is a facility within the meaning of the Consolidated Railway Act of 1879, 42 Vict. c. 9, s. 60, s.s. 3, and that when such privilege is granted to one express company and refused to another, whether by contract or obligatory arrangement or not, it is an illegal bargain in contravention of this 3rd sub.-sec. of the Act.

C. Robinson, Q.C., *McCarthy*, Q.C., and *Creelman*, for the plaintiffs.

S. H. Blake, Q.C., and *Cassels*, Q.C., for the defendants, the railway company.

Moss, Q.C., for the defendants, the express company.

Proudfoot, J.] [June 3.

CASSELMAN v. CASSELMAN.

Estoppel by deed—Subsequent acquisition of estate—Necessity of recital or covenant—Unwilling grantee.

M. C. made a voluntary deed of certain land to L. C. At that time M. C. had no title to the land, it haying been previously sold for taxes and conveyed by sheriff's deed to B. Subsequently, however, to his deed to L. C., M. C. bought back the land from B. There were no recitals or covenants in the deed to L. C., and by it M. C. did "assign, transfer, demise, release, convey, and forever quit claim" to L. C., his heirs and assigns, all his estate in the land.

Held, that M. C. was not estopped from saying he had not the estate when he conveyed

to L. C. For (1) there was no recital or covenant for title in the deed to M. C.; (2) that deed did not purport to grant any estate in the land, but merely to assign or release and quit claim to the assignor's interest therein; (3) the deed never had any operation, for L. C. never paid anything for the land, never went into possession, never claimed to be owner of it, or paid the taxes, and from the first repudiated the gift.

McCarthy, Q.C., *MacTavish* and *MacCraken*, for the plaintiff.

Shepley and *F. M. McDougal*, for the defendant.

Boyd, C.] [June 10.

QUEEN v. ST. CATHARINES

Indian lands—Indian reserves—Title to Indian lands—Constitutional law.

In this action the Province of Ontario sought the intervention of this Court in order that the St. Catharines Milling and Lumber Company might be restrained from trespassing and cutting timber on lands claimed by the Province. The defendants justified under license obtained from the Government of Canada in April, 1883, by virtue of which they asserted the right to cut over timber limits on the south side of Wabegon Lake in that portion of Canada situated between Lake Superior and Eagle Lake. The defendants further pleaded specially that the place in question forms part of a district till recently claimed by tribes of Indians, who inhabited that part of the Dominion and that such claims have always been recognized by the various Governments of Canada and Ontario and by the Crown; that such Indian claims are paramount to the claim of the Province of Ontario, and that the Dominion have by purchase acquired the said Indian title, and that by reason thereof as well as by inherent right the Dominion and not the Province is alone entitled to deal with the said timber limits. It was admitted that the timber lands in question are within the territorial limits of Ontario, as determined by the Privy Council.

Held, that the Indian title to the land in question was extinguished by the Dominion treaty in 1873, known as North-West Angle Treaty No. 3, during the dispute with the Province as to the true western boundary of Ontario, and the extinction of title procured by and for the Dominion enured to the benefit of the Province as constitutional proprietor by title paramount, and it is not possible for the Dominion to preserve that title or transfer it in such wise as to oust the vested right of the Province to the land as part of the public domain of Ontario. It appears as a deduction from the legislation relating to the subject that the expressions "Indian Reserves," or "Lands reserved for Indians" had a well recognized conventional and perhaps technical meaning before and at the date of Confederation. "Lands reserved for Indians" is used in the British North America Act as a well-understood term, and that it was so is further demonstrated when one looks at the results of previous legislation in the various confederated Provinces other than Upper Canada. So also the legislation of Canada since Confederation reflects very clear light upon what was understood by those Indian Reserves. Before the appropriation of Reserves the Indians have no claim except upon the bounty and benevolence of the Crown. After the appropriation they become invested with a legally recognized tenure of defined lands in which they have a present right as to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement. It is "lands reserved" in this sense for the Indians which form the subject of legislation in the British North America Act, *i.e.*, lands upon which or by means of the proceeds of which after being surrendered for sale, the tribes are to be trained for civilization under the auspices of the Dominion. It follows that lands ungranted upon which Indians are living at large in their primitive state within any Province form part of the public lands, and are held as before Confederation by that Province under various sections of the British North America Act. (See sec. 92, item 5; secs. 6, 109, and 117.) Such a class of public lands are appropriately alluded to in sec. 109 as lands belonging to the Province in which the Indians have an interest, *i.e.*, their possessory interest. When this interest is dealt with by being extinguished and by way of compensation in part reserves are allocated, then the juris-

diction of the Dominion attaches to those reserves. But the rest of the land in which "the Indian title" so called has not been extinguished remains with its character unchanged as the public land of the Province.

History of the public lands of Ontario from the time of their acquisition by the Crown till they became subject to Provincial legislative control briefly sketched.

Discussion of the Canadian policy upon Indian questions both before and after Confederation.

Attorney-General and *W. Cassels*, Q.C., for the Crown.

McCarthy, Q.C., and *Creelman*, for the defendants.

PRACTICE.

Q. B. Div.] [March 4.

HATELY v. THE MERCHANTS' DESPATCH CO. ET AL.

Security for costs—Delivery out of bond—Case in the Court of Appeal.

The plaintiff who lived out of the jurisdiction obtained a verdict at the trial, which was affirmed upon motion to a Divisional Court (except as to one defendant against whom the action was dismissed without costs) and the defendants were appealing to the Court of Appeal.

Held, that the plaintiff was entitled to have his bond for security for costs taken off the files and delivered up to be cancelled notwithstanding that the judgment in the plaintiff's favour was liable to reversal in the Court of Appeal.

Aylesworth and *Lees*, for the plaintiff.

Plumb and *Millar*, for the defendants.

Proudfoot, J.] [June 22.

RE LAKE SUPERIOR NATIVE COPPER CO.

Appeal—Extending time for.

Cross-applications in respect of the same subject-matter were argued together and both were dismissed by a judgment pronounced on the 26th April, 1885. The question argued was an important one, viz.: the *ultra vires* of an Act. Separate orders were taken out dismissing the two applications, and the time for appealing from both orders was extended till the 6th June, on which day one of the parties gave notice of appeal from the order adverse to him. The other party who was not desirous of appealing unless his opponent appealed was advised too late to serve notice within the time limited, and therefore applied after the expiration of the time to have it extended.

Held, that it was a proper case for exercising a discretion in favour of the applicant, and leave to appeal was accordingly granted.

J. H. Macdonald, for the application.

Moss, Q.C., contra.

Boyd, C.] [June 26.

SMITH ET AL. v. GREY ET AL.

Foreign Commission—Issue on pleadings.

For a foreign commission to be ordered it is not necessary that the cause should be technically at issue; it is sufficient to shew that some issue is raised on the pleadings which must infallibly be tried if the action be tried at all.

H. D. Gamble, for the defendants.

Arnoldi, for the plaintiffs.

OBITUARY.

HONOUR TO THE BRAVE.

The members of the London Bar have passed a resolution expressive of their deep regret at the death of their professional brother, Skeffington Connor Elliot, and of their sympathy with his parents on the occasion. Mr. Elliot was called to the Ontario Bar in 1880. A son of Judge Elliot, of London, and twenty-six years old at the time of his death, he was practising his profession successfully at Prince Albert in the North-West Territory when the rebellion under Riel commenced. The Mounted Police at Prince Albert and in its vicinity were

few in number and inadequate for the defence of the place and of Fort Carleton which are points where large supplies of stores are usually kept. In this situation volunteers were called for, and among those who promptly responded was Elliot. The insurgents having defied the authorities and seized private property the conflict at Duck Lake ensued on 26th March last, when out of thirty-eight volunteers nine were killed on the spot, and several wounded. Elliot had just assisted a wounded comrade into a sleigh, and turned round to resume the conflict when he fell pierced by a ball and died instantly. He had previously been wounded, but not disabled. It appears the volunteers were led into an ambuscade, and thus suffered very severely, much more so than in any succeeding conflict. But no men could have behaved more courageously. It was only when their total destruction was inevitable owing to the vastly superior numbers of the enemy and their hidden position that the remainder of the volunteer force retreated. The Mounted Police who were separated from the volunteers in the fight suffered severely also, but much less than the volunteers. The latter left the bodies of their slain companions on the field, but they were recovered afterwards, and the nine were placed in one grave. Mr. Elliot's brother, Mr. Hume Elliot, after much difficulty, succeeded in recovering the remains of the deceased which were brought to London and there interred. The funeral was a public one. The shops were closed, and every indication of the deepest sympathy and sorrow on the part of the public was exhibited. In the presence of some 20,000 people the body was interred with military honours; not only the Bar, but the City authorities and the Church of England Synod then in session have testified their sense of the courage and devotion which impelled this young member of our profession to go forth at the first call of his country to arms, and who nobly died in the performance of his duty.

FLOTSAM AND JETSAM.

After a long wrangle between judge and counsel—Judge: "Well, Mr. ———, if you do not know how to conduct yourself as a gentleman, I can't teach you." Counsel: "That is so, my lord." A fact.—*Law Times.*

It having been remarked that lawyers in Texas are not in the habit of bullying witnesses, as is all too common in more civilized places, the explanation was given and accepted as reasonable that a Texas witness would just as soon begin shooting from a witness box as from anywhere else.—*Ex.*

Had a Judicial Mind.—A learned correspondent sends us the following anecdote about a justice of the peace who had a judicial mind: Squire Miller, of Coal Valley, Rock Island County, Ill., is a strict constitutionalist. A young man from Henry County procured a marriage license, and proceeding to Coal Valley, and led his blushing girl before Squire Miller to have the ceremony performed, producing his Henry County license. The Illinois statute says that "the license shall be procured in the county where the marriage is to be solemnized." The squire at first told the young man that he would have to get a Rock Island County license, as his jurisdiction did not extend outside of the county, but, on being told that the state of the young man's treasury department would not admit of such an outlay, the squire's legal mind at once hit upon a plan whereby he could bag the fee and still keep within the letter of the law. Coal Valley is only a mile from the county line between Rock Island and Henry counties, so, taking the matrimonial candidates in his buggy, he drove to the east border of the county. There they alighted, and directing the couple to stand just east of the centre of the highway the squire stationed himself on the west side of the line, and with the couple in Henry County and himself in Rock Island County, he proceeded to perform the marriage service, remarking: "There, young man, that is strictly accordin' to law; two dollars, please." The squire has a judicial mind, and will rise higher if he lives long enough.—*Ex.*