Canada Law Journal.

VOL. XXI. JANUARY 15, 1885. No. 2.

DIARY FOR JANUARY.

15. Thur.....Graduates seeking admission to Law Society to present papers.
17. Sat.....Last day for producing papers before admission as Solicitors.
18. Sun.....*2nd Sunday after Epiphany.*
20. Tues.....First Intermediate Examination.
22. Thur.....Second Intermediate Examination.
23. Fri.....Sir F. B. Head Lieut. Governor U. C., 1836.
25. Sun.....*3rd Sunday after Epiphany.*
27. Tues.....Solicitors' Examination.
28. Wed .....Barristers' Examination.
31. Sat .....Lord Elgin Governor-General, 1847.

TORONTO, JANUARY 15, 1885.

IT would certainly be a very great convenience at Osgoode Hall if there were a telephone office upstairs. The constant necessity of going down to the entrance hall whenever one is "Wanted at the telephone," to use the familiar phrase of the despotic small boy whose summons one is so frequently called upon to obey, or whenever one wants to play the same trick on some one at the other end of the wires, is a great waste of time, strength and patience. Surely the funds of the Law Society could stand the expense of an office upstairs as well as one downstairs, and we certainly think any bencher who took the matter up would be a benefactor, not only of his own species, but also of the humble frequenters of the building, who have so long borne what otherwise one would be apt to call a most intolerable nuisance.

THOSE of our readers who are suffering from a plethora of brain matter may gain relief by trying to follow Lord Cairns in the windings of his "circular" arguments in the recent case of *Bowen* v. *Lewis*, 9 App. Cas., at p. 906. A testator devised his real estate to T. during the term of his natural life, and after his decease to his children, and if T. died without issue, then the question was, what estate did T. take under the will? Lord Cairns, after indicating his own view, observes that those who had arrived at a different conclusion to himself seemed to him to have done so by a process "very like the process of a circular argument." He then states the argument as follows:—

"The word 'estate' carries the fee simple, and therefore when you have the gift of an 'estate' to 'children' in this will, it must mean a gift to the children in fee simple; because it is a gift to the children in fee simple, *ergo*, the word 'children' cannot be a *nomen collectivum*, because the gift to the children is not a gift to them as a *nomen collectivum; ergo*, the gift over upon dying without issue must mean not generally dying without issue, but dying without the children mentioned before. Now, I might illustrate the fallacy of this by a circular argument in the opposite direction. If I begin at the other end you will have quite as good a circular argument backwards. Here is a gift over on death without issue. That means on the failure of issue generally. Therefore, when you go back and find that preceded by a gift to 'children,' in order to make the two consistent the word 'children' there must be a *nomen collectivum*, and must mean issue; and because you have a gift to children as a *nomen collectivum*, that is to issue, *ergo*, they cannot take as purchasers in fee simple, but must take an estate tail. It seems to me that the circular argument is just as good in the one direction as in the other, if you proceed upon the principle of putting a construction upon one clause without looking at the will as a whole."

MARRIED WOMEN.

In the case of *Re March Mander* v. *Harris* 51 L. T. N. S. 380, the English Court of Appeal reversed the decision of Chitty, J. (24 Ch. D. 222). The case involved the effect of the Married Women's Property Act, 1882, upon the construction of a will, whereby the testator devised to a man and his wife and a third person certain property. Chitty, J. had determined that the effect of the Married Women's Property Act, 1882, was to work an abrogation of the ancient rule of construction, whereby the husband and wife were regarded in law as but one person, and would, therefore, take a moiety, the third person taking the other moiety; and that now by virtue of the Married Women's Property Act, 1882, the parties severally take under such a devise one-third each. The Court of Appeal however held that the will, having been made in 1880, was not affected by the Married Women's Property Act, 1882, subsequently passed, notwithstanding that the testator did not die until 1883, after that Act came into operation. The Court of Appeal, however, was careful to guard itself against being in any way committed to any opinion as to what would be the judgment of the Court in such a case if the will were made after the Married Women's Property Act, 1882, took effect. This case follows in principle *Jones* v. *Ogle* L. R. 8 Chy. 192, in which it was laid down that the construction of a will is not affected by a statute passed subsequent to its date, even though the testator may not die until after the statute takes effect. But in neither *Jones* v. *Ogle*, nor yet in *Re March*, does the Court appear to have considered how far such a ruling is consistent with the 24th section of the Wills' Act (see R. S. O. c. 106 s. 26), which expressly declares that every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. It might be argued that the testator must be presumed to make his will with reference to the state of the law at the time the will bears date; but on the other hand it may be said that a testator is to be presumed to know the law, and if any Act is passed affecting the construction of a will previously made by him, and he does not choose to alter it, he should be presumed to have adopted the alteration in its construction effected by any subsequently passed statute. At all events we think this exception which the Court of Appeal appears to have engrafted on the 24th section of the Wills Act should at least have been justified by some reference to the latter Act, which, however, is not referred to in either case either by Court or counsel. Possibly the question may to some extent be affected by the rule laid down by the Court of Appeal in *Ex parte Walton* 17 Ch. D. 756, and adopted by the House of Lords in *Hill* v. *East and West India Dock Company* 9 App. Ca. 448 (noted vol. 20, p. 315), to the effect that when a statute enacts that a certain state of facts shall be deemed to exist, which do not in fact exist, that the purpose for which that fiction is converted into fact is to be ascertained by the Court and the statute making the fiction a legal fact is to be confined to that particular purpose. We believe the purpose for which the clause in the Wills Act, to which we have referred, was passed was, primarily, to prevent intestacy as to lands acquired after the making of a will; the words, however, of the statute appear quite wide enough to warrant the construction that every will is to be construed according to the state of the law existing at the time of the testator's death, even though it may have been varied by statute between the making of the will and the death of the testator.

THE CHANCERY DIVISION.

IT has been for sometime past apparent, that notwithstanding that the various Divisions of the High Court of Justice have, in all civil proceedings, equal and co-ordinate jurisdiction, and that theoretically the same kind of law is to be administered in each Division of the High Court; yet, for some reason or other, there has been a manifest tendency on the part of a majority of suitors to prefer bringing their actions in the Chancery Division. Why this should be so, it is not very easy to explain. Theoretically the relief given would be just the same in the Queen's Bench Division, as in the Chancery Division, in like cases, and yet practically it might prove to be something very different. For instance, in cases where equitable relief is sought, on the one hand you have a Bench which is familiar with the principles of equity jurisprudence, and on the other you have in the Queen's Bench and Common Pleas Divisions a Bench, which, without being disrespectful, may be characterized as not quite so familiar with that branch of law. This fact may have much to do with the preference of suitors for bringing actions in which equitable relief is sought in the Chancery Division. But this does not by any means afford a complete explanation of the reason of the excess of business in the Chancery Division; for many actions for purely legal demands have been brought in that Division for the trial of which it cannot be for a moment pretended that the judges of the Chancery Division have any special aptitude, not equally enjoyed by their brethren in the other Divisions.

We believe that the cause of the apparent superior popularity of the Chancery Division is, in a great measure, attributable to the fact, that the class of business formerly exclusively cognizable in the Court of Chancery exceeded in volume that transacted in either of the other Courts, and this class of business naturally gravitates now to the Chancery Division, although, as we have said, it is theoretically precisely the same kind of tribunal as the other two Divisions, and exercises precisely the same jurisdiction, and has the same code of practice, and the same tariff of costs. This arises from the habit practitioners have acquired of transacting their business before certain judges and officers who are familiar with the class of cases formerly brought exclusively in Chancery, and this natural preference of solicitors for doing business before men familiar with the work required to be done, rather than before those who, in some cases, are but novices and without experience, is not to be wondered at. It is a fact which was perhaps not sufficiently taken into consideration by the Legislature, when it endeavoured, by merely changing the name of the Court without altering its *personnel*, to make business flow in unaccustomed channels.

In order to check the flow of business into the Chancery Division, or rather to equalize the flow of business into all the Divisions, a Rule has been recently passed by the Supreme Court, requiring writs to be issued alternately from all the Divisions. It remains to be seen whether this will have the effect intended. The expedient of issuing writs alternately, is not, by any means, an absolute check upon suitors selecting their own forum. The device of issuing writs in fictitious suits, in order to bring an action in a particular Division, has been resorted to in the past, and will no doubt be resorted to again, whenever the solicitor deems it desirable to sacrifice a dollar or two, in order to bring an action in any particular Division.

Preparatory to passing the Rule referred to, returns were procured from the various officers who issued writs; these returns we believe show that since the Judicature Act came into force up to the 1st December

last, the number of writs issued from the different Divisions have been as follows:—

	Q.B.	C.B.	Chy.	Excess in Chy.
1881.....	676	662	982	306
1882.....	1979	1958	2694	715
1883.....	2283	2284	2833	549
1884.....	2027	2015	2774	747
	6965	6919	9283	2317

It will thus be seen, that the excess of business in the Chancery Division over that in either of the other Divisions, has, in three years and a-half, amounted in the aggregate to 2,317 actions. In addition to actions commenced by writ, there are also to be added a large number of actions for partition and administration, commenced by notice of motion, and which have usually been prosecuted in the Chancery Division, and of which no account is taken in the returns referred to. Thus with the same staff of judges, and about the same staff of officers, as the other Divisions, the Chancery Division has, according to these figures, been doing at least one-third more work, during the past three years and a-half.

We believe London is the only city in the Province, in which the writs issued in the Chancery Division, have not largely exceeded those issued in either of the other Divisions, during the past year. For instance, it appears that at the following places, the writs issued were as follows:—

	Q.B.	C.P.	Chy.
Brantford	39	39	49
Ottawa	46	47	153
Kingston	26	25	96
Belleville	66	64	171
St. Catharines	43	44	54
Guelph	35	35	103
Hamilton	126	126	234
While in London the figures were	252	252	137

The reason for this singular preference of Middlesex suitors for the Queen's Bench and Common Pleas Divisions, we are at a loss to conjecture.

Assuming that the effect of the new Rule will be to equalize the number of cases in the various Divisions, we may be sure of this, that it will inevitably lead to the transfer of a great many actions from one Division to another. All actions commenced in the Chancery Division required to be tried by a jury will have to be transferred, according to the practice established, to what is called very erroneously a "Common Law Division," because the Chancery Division has no machinery for trying actions by jury. Then again we expect it will be found necessary to transfer from the so-called "Common Law Divisions" to the Chancery Division many actions in which equitable questions arise—because the judges of the so-called "Common Law Divisions" prefer not to try them. If carried to any great extent, the practice of transferring actions will be found to be fraught with not a few inconveniences, and have a tendency to induce mistakes in the conduct of proceedings, and may possibly create difficulties in the way of tracing up proceedings, after the lapse of a few years.

This practice of transferring actions, for any such reasons as we have mentioned, seems opposed to the intention of the Judicature Act. That Act assumes that each Division shall be competent to try every action that is brought in it. It virtually declares that a specific performance action is not one for the exclusive consideration of the Chancery Division, neither are actions for assault and battery, or libel, or seduction, peculiarly within the province of the so-called "Common Law Divisions," and yet every time an action of assault and battery is transferred from the Chancery Division to the Queen's Bench Division, or a specific performance action from the Queen's Bench Division to the Chancery Division, the principle of the Act appears to be violated. The only cause of transfer the Act seems to recognize is the equalization of business in the different Divisions. When an action in the Chancery Division is required to be tried by a jury, instead of

the action being transferred, it would, we think, be far better if the practice authorized a suitor to enter his case for trial at the assizes as a matter of course. In the same way if a suitor desires an action commenced in the Queen's Bench Division in which any equitable relief is sought, to be tried before a judge of the Chancery Division, we do not see why he should not be at liberty to enter his action for trial at the special sittings appointed for the trial of actions in the Chancery Division.

At present the suitor has fewer facilities for the trial of actions than he had before the Judicature Act. Formerly actions in the Queen's Bench, or Common Pleas, triable before a judge without a jury might be entered for trial, as of course, at the Chancery Sittings. Now the judges at assizes refuse to try Chancery Division cases, and the judges at Chancery Sittings refuse to try Queen's Bench and Common Pleas actions. What is wanted is more reciprocity in this respect. And if any one Division becomes overburdened, there ought to be some means of securing with greater facility than appears at present to exist, the assistance of the judges of other Divisions.

RECENT ENGLISH DECISIONS.

THE December numbers of the *Law Reports* comprise 9 App. Cas. pp. 757 to 976; 27 Ch. D. pp. 361 to 712; 13 Q.B.D. pp. 693 to 878; 9 P.D. pp. 217 to 256.

BUILDING SOCIETY—BORROWING POWERS—OVERDRAWING BANKERS' ACCOUNT.

In the first of these there are only two cases which requires special mention here. The first is *Brooks and Co.* v. *the Blackburn, etc., Building Society*, p. 857. Here the points decided to which it seems desirable to call attention were that overdrawing a bank account is borrowing, and a Building Society, which has by its charter no borrowing power, has no power to overdraw its banking account, and if its bankers, knowing the limited nature of the powers of the Society, permit it to overdraw its account, they cannot take the place of creditors of the Society in respect of such overdrafts. Lord Blackburn says, at p. 864: "The respondents, who are bankers, agreed to open an account with the trustees. In all banking accounts the bankers, so long as the balance of the account is in favour of the customer, are bound to pay cheques properly drawn, and are justified, without any inquiry as to the purpose for which these cheques were drawn, in paying them. But they are under no obligation to honour cheques which exceed the amount of the balance; or, in other words, to allow the customer to overdraw. Bankers generally do accommodate their customers by allowing such overdrafts to some extent. When they do so the legal effect is that they lend the surplus to the customers, and if the person drawing the cheque is authorized to borrow in this way on account of the customers, the bankers can charge the amount against those customers and their principals, and can make available any securities which, either from the general custom of bankers or from a special bargain, they have to secure their account. . . It was argued that overdrawing a bank account, or, as it was called, taking advantage of banking facilities, was not like other kinds of borrowing, and two decisions of Stuart, V.C., *in re Cefu Cilcen Mining Company*, 7 Eq. 88, and *Waterloo* v. *Sharp*, 8 Eq. 501, were cited as authorities for that. I am not sure that I quite understand how far the Vice-Chancellor meant to go, but if he did mean this in any sense that would affect the present case I cannot agree with him. . . If it could be shown that the course of business authorized by the rules was such as to give, as incidental to it, a power to borrow, it would be authorized, though not expressly authorized. I do not think

it can be said that it is necessarily incident to the business described by the rules that there should be a power to borrow." Before dismissing the case it should be stated that the Court of Appeal had held that, the Society having deposited certain deeds with the bank to be held as security for the balance from time to time, the bankers, though not able to hold these deeds as securities for the overdrafts, were able to hold them as a security for repayment of so much of the moneys advanced by them as was applied by the Society in payment of its debts and liabilities properly payable, and had not been repaid to the bankers. The decision on this point was not appealed against, and therefore the House of Lords was not called upon to give a decision as to it, nevertheless Lord Blackburn says at p. 866: "The Court of Appeal, in the present case, held that though there was nothing that amounted to an assignment to the bankers of the claims of those who were paid off by the money advanced, yet if it could be shown that such claims were in fact paid off thereby, there was an equity in substance to give them, the bankers, the same benefit as if there had been such an arrangement. This is an important decision. It seems to be justice; whether it is technical equity is a question which, I think, is not now before this House."

Rule in Shelley's case.

The other case in this number which seems to require notice is *Bowen* v. *Lewis* at p. 890. It certainly does not come within the theme of these articles to attempt to note in a concise form the decision upon the construction of what Lord Cairns calls "the very difficult and obscure will," which was before the House, much less to attempt to trace the reasoning in the different judgments, but there are one or two *dicta* on the Rule in Shelley's case to which attention may be called. The first is by Lord Selborne, at p. 898: "The rule in Shelley's case, 1 Rep. 93 b, ought not, in my opinion, to be extended, so as to defeat unnecessarily the expressed intention, by straining the interpretation of such words as 'child or children,' when they are capable of being understood in their usual and primary sense," which he explains to be issue of the first generation. The second is by Lord Cairns, at p. 907, and throws a flood of light upon the true meaning of the rule in Shelley's case: "I observe that it has been said that the rule in Shelley's case, as it is called, is a technical rule, and that in considering whether you must apply the rule in Shelley's case, you ought to proceed as if you were dealing with a technical rule, and not to give way to technicality unless it be absolutely necessary. I am bound to say that in my opinion the rule in Shelley's case is not only not a technical rule, but it is the very opposite of a technical rule. It is a rule which has been established through a long course of decisions extending over a great many generations, and upon the ground, as I understand it, that it is desirable to avoid the effect of technicality. The foundation of the rule in Shelley's case, as I understand it, is this: You have an indication of a general intention, which you gather from the whole of the will, that the estate shall travel through the issue generally of a certain person. You have that accompanied, no doubt, with a particular intention that the first taker shall take an estate for life; but in order to give effect not to a technical construction, which would limit the first taker to a life estate, but to give effect to the general intention of the testator, and to make the estate travel through the issue generally, as the testator intended it to do, you apply the rule in Shelley's case. Otherwise, if you do not do that, the consequence is that the only other resource which you have is to give to the first taker in the series of issue an estate by purchase, in which case

it will not go through the issue generally, but only through the descendants of that particular head of the issue. Therefore I repeat that the rule in Shelley's case appears to me not to be a technical rule, but to be a rule of substance in order to give effect to the intention."

LAW SOCIETY.

MICHAELMAS TERM, 1884.

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. Mackintosh, Carruthers (awarded honors and silver medal), Burwash (awarded honors and silver medal), Collier, Robertson, Douglas, Hutcheson, Valin, Grace, Symons, Saunders, Allen, Weld, Bunting, Sorley, Marshall, Waddell, Decatur, Lawrence, Weir, Nelson, W. D. Jones, Proudfoot, D. F. McArdle. (These names are arranged in the order in which the candidates appeared before Convocation for call.)

The following gentlemen received Certificates of Fitness, namely:—Messrs. Knowles, Witherspoon, Murphy, Proudfoot, Burwash, Valin, Ryerson, Richardson, Middleton, Palmer, Sproule, Blackburn, Hayes, Symons, Morphy, Allan, Flock, Gordon, Duncan, Carswell, Bunting, Milligan, W. D. Jones, Scilly, C. F. Smith, Weld and Lawrence.

The following gentlemen passed the Intermediate Examinations, namely:—

First Intermediate.

C. J. Atkinson, honors and first scholarship, and Messrs. Grierson, Cameron, W. K. O'Flynn, Ross, Willoughby, Macdonald, Cameron, D. O. Denovan, A. M. Bell, Sinclair, Snedden, Percival, Le Visconte, Moore, Beattie, Gould, Hislop, Smith, McCrimmon, Raines, Arnold, Cochran, Heaton.

Second Intermediate.

A. E. O'Meara, honors and first scholarship, A. M. Taylor, honors and second scholarship, W. S. Brewster, honors and third scholarship, H. Wissler, R. B. Beaumont, C. T. Glass, E. K. C. Martin, E. A. Holman, honors, and Messrs. Urquhart, Rogers, Fisher, A. A. McIntosh, Hardy, Ormiston, Judd, Clarke, Grant, Gray, Raymond, Fisher, R. G. Lees, Nason, McArthur, Walker, Bennett, Chisholm, Morrison, Campbell, Brooke, Crothers and W. G. Fisher.

And the following candidates were admitted as Students-at-Law, namely:—

Graduates.

Francis A. Drake, George Watson Holmes, Arthur Stevenson, Herbert L. Dunn, John Frederick Dumble, Nicholas Ferrar Davidson, Clement Rowland Hanning, Edward Halton Britton.

Matriculants of Universities.

Alexander Clark, Henry A. Wardell, H. F. Bongi, D. H. Chisholm, F. J. Travers, J. F. Hewitt, R. V. Clement, James A. H. Campbell, Robert L. Elliott, Robert Gordon Smith.

Juniors.

G. C. Gunn, H. W. Lawlor, J. Arthurs, W. Pinkerton, G. D. Heyd, F. B. Geddes, R. E. Lazier, F. F. Pardee, W. L. B. Lister, R. M. Macdonald, E. E. Du Vernet, F. S. Mearns, R. T. Wilgress, S. D. Lazier, R. Segsworth, J. H. McGhie.

Monday, 17th November.

Present—The Treasurer, and Messrs. Moss, Maclennan, Hoskin, Irving, Bethune, Cameron, Mackelcan, Robertson, Morris, Murray, S. H. Blake, Foy, Kerr, L. W. Smith, McMichael, Read, Guthrie and Hudspeth.

The minutes of last meeting were read. The Secretary reported that the name, J. M. Best, who was called in Easter Term, 1884, was omitted by mistake from the minutes, and that the name of Leonard Harstone, who was called in Hilary Term, 1880, was also omitted by mistake from the minutes.

Ordered, that the minutes of Easter Term, 1884, be corrected by the insertion of the name of J. M. Best, as called to the Bar in that term, and that the minutes of Hilary Term, 1880, be corrected by the insertion of Leonard Harstone's name, as called to the Bar in that term.

A letter from Col. Hewitt, relating to

the Military College at Kingston was referred to the Legal Education Committee for consideration and report.

The letter from Mr. Morgan accompanying the Queen's Book was read, and the Treasurer reported that he had acknowledged the same.

The Finance Committee reported that they had considered the question of the care and proper maintenance of the grounds about Osgoode Hall, and recommended that the work in connection with them be given to Mr. James Stephens, a skilled gardener who had tendered for the same.

The report was adopted on the understanding that the tender should include the manuring of the trees, and the planting of fresh trees, the manure and trees to be provided by the Society.

TUESDAY, 18TH NOVEMBER.

Present—The Treasurer and Messrs. Moss, Morris, Bethune, J. F. Smith, Foy, Britton, Irving, Hudspeth, Maclennan, Hoskin, S. H. Blake, Murray, Martin, Read and Kerr.

The minutes of last meeting were read.

Mr. Martin, from the County Library Aid Committee, presented their report as follows:—

COUNTY LIBRARY AID COMMITTEE.
OSGOODE HALL, 18th Nov., 1884.

The County Libraries Aid Committee beg leave to report as follows:—

1. The time fixed by the Rule 141 for the re-consideration of the scheme for establishing County Libraries expired in June last, and under the terms of this Rule the whole question is now open for reconsideration.

2. In February last our Committee issued a circular calling the attention of the profession to the subject, requesting that all applications for the establishment of libraries should be made promptly, and inviting suggestions as to the establishment or continuance of County Libraries. This circular was sent to the County Judge, County Attorney and Deputy Clerk of the Crown in each county and to many members of the profession.

3. The Committee has received and considered information and suggestions from several of the County Judges and many members of the profession upon the subject of the County Libraries.

4. The Committee finds that the libraries have proved of great value to the judges and the profession generally, and recommends that the system be continued and the County Libraries maintained and placed on a permanent footing.

5. Applications have been received since February last for the establishment of three new County Libraries, *i.e.*, County of Welland, County of Essex and County of Perth. In the case of the County of Welland some formal proofs are yet required. In the Essex case the articles of incorporation require that the library is to be kept at Windsor, where the County Judge resides and where the Judge's Chambers and the Warden's offices are kept, and almost all the practitioners reside (there being no resident practitioners in the County town) and the Committee recommends that under the circumstances this change be permitted. In the County of Perth case the application has not been completed owing to there being no suitable room for the library in the Court House, and no arrangements yet made for keeping the library elsewhere, but these difficulties are expected to be overcome shortly, and this Committee recommends that the usual grant be made to these associations when proof of their organization and the other proofs required by the rules have been duly completed and reported on to the Finance Committee.

6. A statement is annexed shewing the sums actually contributed to the seven County Libraries now in operation, the gross amount being $6,069 of which $2,820 are for Initiatory Grants, and $3,249 for annual grants spread over the four years.

7. The Committee recommends that the Initiatory Grant to libraries already established be increased in cases where the initiatory grant received from the Law Society has not equalled the sums paid in cash, and the value of the books given to the County Library Association provided that such increase should not in the whole exceed the sum of $20 for each practitioner resident in the County at the date of the establishment of such association, and in case contributions in money or books made to any existing library association and to be taken into account in estimating its first grant have been sufficient to entitle it to the maximum grant of $20, the contributions may be supplemented at any time before 1st May, 1885, and that any future applications for the establishment of County Libraries should be referred to Convocation to be dealt with as the state of the finances of the Law Society may permit and Convocation shall see fit.

8. The Committee recommend that the annual grant should hereafter be based upon the amount contributed in cash for annual subscriptions by the members of the association instead of being regulated as at present to a great extent by the number of practitioners resident in each county.

9. The Committee believe that the change will not only give the members of these associations a greater inducement to contribute to the maintenance of the libraries, but will afford a satisfactory assurance to the Law Society for the efficient carrying out of the scheme, the adoption of this principle will not it is believed materially increase the annual grant to be made by the Law Society as it would appear from the returns that in every county there are resident practitioners who are not contributors to the funds of the County Libraries. The annual subscription under the present system ranges from $2 to $10 per annum, but in most cases $5 is adopted, and this sum seems to be reasonable and within the reach of all practitioners.

9a. The Committee recommend that in future the annual grants be made on the basis of the Law Society contributing an amount equal to that

actually paid in by the members of the association during the fiscal year not exceeding $5 for each member of the association, and that this rule should go into force and apply to the next annual grant.

9b. The Committee recommends that the fiscal years of the association should begin on 1st January and end on 31st December in each year, that the reports and financial statements covering the fiscal year be sent in promptly after 31st December, and the annual grants paid as soon as practicable after the receipt of the reports provided that where reports are not received before 10th January payments shall not be made unless otherwise ordered till three months after the receipt of the report.

10 The Committee recommends that rules be adopted for the establishment and maintenance of County Libraries in accordance with the terms of this report.

(Signed) EDWARD MARTIN, *Chairman.*

Circular referred to in Report.

COUNTY LIBRARIES AID COMMITTEE,
OSGOODE HALL, Toronto, 9th Feb., 1884.

SIR,—The County Libraries Aid Committee have been authorized by the Law Society to take steps to ascertain whether any more County Libraries are likely to be formed.

The County Libraries were established under rules of the Law Society which will be found in the *Canada Law Journal* for 1879, p. 180.

Subsequently these rules were amended by increasing the initiatory grant from $6 to $12. See *Canada Law Journal* for 1882, p. 357.

County Libraries have been established at Hamilton, London, Brantford, Peterborough, Whitby, Kingston and Walkerton, and have been found of great service.

It is felt that a sufficient time has now elapsed to test the practical working of the County Libraries, and it is desirable without further delay to frame rules for placing them on a permanent footing and making suitable provision for their maintenance, but before these rules are adopted it is desired to call the attention of the members of the profession, resident in the different county towns, where there are no County Libraries to the necessity of immediately taking the proper steps to establish libraries before the scheme is finally closed.

It is the intention of the County Libraries Aid Committee to submit to Convocation at Easter Term (19th May next) their scheme for the future management and aid to be granted to the County Libraries.

It is needless to say that much will depend on the number of these libraries and the Committee can only deal practically with those then actually in existence.

The Committee, therefore, request that all applications for the establishment of County Libraries shall be completed and forwarded to J. H. Esten, Esq., Secretary of the Law Society, not later than 1st May next.

The Committee also hope that you will favour them with your views and any information or suggestions which may occur to you on the subject of the establishment or maintenance of County Libraries.

Yours truly,

(Signed) EDWARD MARTIN, *Chairman.*

Statement of Moneys paid the following County Libraries Association for the years 1880, 1881, 1882, 1883, and 1884:—

NAMES.	DATE.	Initiatory Grant.	Annual Grant, 1st 3 years.	Annual Grant, 4th & 5th y'rs.	TOTAL.	REMR'KS
		$	$	$	$	
Hamilton .	1880	432	....	.....		
	1881	....	288	.. ...		
	1882	432	288	.....		
	1883	....	....	288		
	1884	....	....	288	2016	
Middlesex .	1880	360	....	.....		
	1881	....	240	.....		
	1882	360	240	.....		
	1883	....	....	240		
	1884	....	....	180	1620	
Peterboro'.	1880	132	....	.....		
	1881	....	92	.....		
	1882	....	92	.....		
	1883	132	....	92		
	1884	. ..	....	92	632	
Frontenac.	1880	120	....	.....		
	1881	....	92	.....		
	1882	....	72	.....		
	1883	120	84	.....		
	1884	....	...	34	522	
Brant	1880	102	...	.....		
	1881	....	76	.....		
	1882	....	76	. ....		
	1883	102	....	76		
	1884	...	....	63	495	
Bruce	1880	126	....	.....		
	1881	....	80	.....		
	1882	126	....	80	412	
Ontario ...	1883	276	....	.....		
	1884	....	....	96	372	
		2820	1720	1529	6069	

The report was read and received. Ordered to be considered forthwith. Considered and ordered to be further considered at the meeting of Convocation on Friday, 28th November.

NOVEMBER 22ND, 1884.

Convocation met.

Present—The Treasurer and Messrs. Maclennan, Irving, L. W. Smith, Hoskin, Morris, Moss, Bethune and J. F. Smith.

Mr. Irving moved, seconded by Mr. J. H. Morris, That the Reporting Committee be requested to report to Convocation during this term upon the exact condition of the reports of the election trials and decisions since the publication of Hodgin's Reports, and also of the preparation for the next Digest. Carried.

FRIDAY, NOVEMBER 28TH, 1884.

Convocation met.

Present—The Treasurer and Messrs. Irving, Guthrie, Morris, Hoskin, Martin, Robertson, Murray, Britton, Fraser, Bell, Foy, Cameron, J. F. Smith, McCarthy, Read and McMichael.

The consideration of Mr. Martin's motion to adopt the report of the Committee on County Libraries was resumed.

The report was ordered to be considered clause by clause. Each clause was carried. The report was adopted.

Mr. Martin moved for leave to bring in a rule in pursuance of the report. Carried.

The rule was brought in.

Mr. Martin moved that the rule be read a first time.

The rule was read a first time, and is as follows:—

COUNTY LIBRARIES.

New Rule adopted 28th November, 1884, in pursuance of Report dated 18th November, 1884.

All existing rules upon the subject of County Libraries are hereby repealed, and the following Rule is substituted therefor:—

Rule 142. "That until further ordered, Branch Law Libraries for the use of the Courts and the profession may be established and maintained in any county town, or, in exceptional cases, in such other place in the county as Convocation may allow, on the following conditions:"—

1. That to "The County Libraries Aid Committee," shall stand referred all correspondence on the subject, and the Committee shall have power, subject to the directions of Convocation, to work the scheme so far as the Society is concerned; the Finance Committee retaining its control over expenditure.

2. That the practitioners in any county or union of counties may form a Library Association, under chapter 168 of the Revised Statutes of Ontario, by the name of "The (name of the county town or the county, or union of counties) Law (or Law Library) Association."

3. That it shall be provided by the Constitution of the Association, that—

(*a*) The trustees thereof shall hold all the books thereof on trust, in case of the dissolution or winding-up of the Association, or the disposal of its property, to satisfy and repay to the Law Society all sums advanced by the Society to the Association.

(*b*) That a room for the custody and use of the books, and proper arrangements for their custody, shall be provided if possible in the Court House.

(*c*) That the books shall be for the use of the Judges of the county and of those practitioners who become members of the Association and pay the prescribed annual and other fees, and also for use, during Courts and hearings before the Master in Chancery, of the Judges, and of all members of the profession residing out of the county.

(*d*) That the prescribed annual and other fees shall not exceed for those practitioners who do not keep offices in the county town, or in the town in which the Library is kept, one-half of the amount fixed for those who do keep offices in the county town.

(*e*) That at least one-half of the said fees and the whole of the aid at any time granted by the Law Society shall be applied in the purchase, binding, and repairing of books for the Library.

(*f*) That the Association shall make an Annual Report to the Law Society, shewing the state of its finances and of its Library for the fiscal year, which shall commence on 1st January and end on 31st December of each year, with such other particulars as may be required by the Standing Committee.

4. That the Association shall transmit to the Law Society proof of its incorporation, and a copy of its declaration and by-laws containing the above provisions, and proof of the condition of its funds and Library; and proof that it has acquired a suitable room therefor, with such other particulars as may be required by the Standing Committee.

5. That the Standing Committee being satisfied that the conditions above named have been complied with, may report thereon to the Finance Committee in all cases in which applications have been received prior to 1st November, 1884, stating the amount to which, on the principle hereinafter stated, the Association is entitled, and thereupon the Finance Committee may authorize payment thereof. That in all cases in which applications shall be received after 1st November, 1884, such applications shall be referred to Convocation, to be dealt with as the state of the finances may permit and Convocation shall see fit.

6. That, it being expedient to grant more liberal aid to libraries during the early years after their institution, the grant in aid from the Society shall be for the initiatory or first grant an amount double the amount of the contributions in money actually paid, or of the value of books actually given, from all local sources, such grant, however, not exceeding a maximum sum of twenty dollars for each practitioner in the county or union of counties; and for each year thereafter an amount equal to the amount of the fees actually paid to the Association by its members, such grant, however, not exceeding a maximum sum of five dollars in respect of each paid subscription.

7. This rule shall extend to existing Library Associations.

8. In case the contributions in money or books made to any existing Library Association, and to be taken into account in estimating the amount of its first grant, have been insufficient to entitle it to the maximum first grant, hereby provided, it shall be competent to supplement such contributions at any time before the 1st May, 1885, and on evidence thereof being supplied, such Association may receive the balance coming to it in respect of the maximum first grant under this rule.

9. That all annual grants be payable within one month after the 31st day of December in each year, provided the required reports and information have been supplied within fifteen days thereafter, and that in case of default, the grant be not payable for three months after such reports or information have been supplied, unless otherwise ordered by the County Libraries and Finance Committees.

10. That the Standing Committee shall report to Convocation on the 1st day of Hilary Term in each year on their operations for the previous year.

Mr. Martin moved for leave to read the rule a second time to-day. Carried unanimously.

The rule was read a second time.

The rule was ordered to be read a third time at the next meeting of Convocation.

SATURDAY, DECEMBER 6TH, 1884.

Convocation met.

Present—The Treasurer and Messrs. Moss, Hoskin, Martin, Meredith, J. F. Smith, Foy, Morris, Kerr, Murray, Irving, Read, Ferguson and Cameron.

Mr. Hoskin presented the report of the Discipline Committee on the case of Mr. C. R. Irvine, as follows:—

1. The Committee on Discipline, to whom the case of Mr. Irvine was referred for investigation, beg to report to Convocation that they duly notified him to appear before them, and that he appeared accordingly this day.

2. That they heard his explanation, and are of opinion that it is not satisfactory.

3. That his conduct in connection with the matter was unprofessional, and they recommend that he be called before Convocation to be severely censured.

All which is respectfully submitted.

(Signed) JOHN HOSKIN,
Chairman.

December 5th, 1884.

The report was read and received.

Ordered for consideration forthwith.

The report was adopted.

Ordered, That Mr. Irvine be called before Convocation to be severely censured.

Mr. Irving moved the third reading of Mr. Martin's rule on the subject of county libraries. Carried.

Mr. Irving moved that the rule do pass. Carried.

Mr. Foy moved, pursuant to notice, That the use of the dining room be granted to the Osgoode Legal and Literary Society for their next monthly dinner.

Mr. Cameron moved in amendment, That the use of the dining room be granted to the Osgoode Legal and Literary Society for their monthly dinner subject to such regulations as may from time to time be adopted by the Finance Committee.

The amendment was carried.

Mr. Meredith, in the absence of Mr. Britton, moved his motion as follows, namely:—

That the Reporting Committee see that immediately upon the making of any new rule or order of court, the same is printed and sent to the members of the profession. Carried.

Mr. Meredith gave the following notice, namely:—

That he would at the next meeting of Convocation move for the appointment of a committee to consider the expediency of providing for the establishment of law schools outside of Toronto, and also the expediency of providing for the holding of Intermediate and Final Examinations at a point east of Toronto, and one west of Toronto, as well as at Toronto.

Mr. Read gave notice that at the next meeting of Convocation he would move, That a rota of Benchers be formed to lecture in the law school; at least—lectures to be delivered by each Bencher on the rota, or by a substitute, at stated periods during the law school term, of which notice is to be given.

Mr. Irvine, pursuant to order, was called in and censured.

Mr. Irvine stated that he had been misled by Mr. Titus, and expressed his regret for his course and his determination not to repeat his error.

TUESDAY, DECEMBER 30TH, 1884.

Convocation met.

Present—The Treasurer and Messrs. Read, Martin, Moss, Meredith, J. F. Smith, Morris, Irving, Maclennan, Murray, L. W. Smith and McMichael.

The minutes of last meeting were read and approved.

Mr. Maclennan moved the following resolution, seconded by Mr. Moss, namely:

"The Benchers have heard with great sorrow of the death of Mr. Bethune, one of their number, at the early age of forty-five years.

"Mr. Bethune was for some time a lecturer in the Law School established by Convocation, and was afterwards elected a Bencher; and he continued to fill that position continuously for ten years, and obtained the respect, esteem and friendship of all his colleagues.

"Mr. Bethune's memory will long be cherished by his brethren of Convocation and of the Bar generally as that of a dear friend too early removed from those by whom he was loved and respected.

"The Benchers desire, also, to express their sympathy with Mrs. Bethune and her family in their great bereavement."

The resolution was unanimously adopted.

Ordered, That a copy of the above resolution be engrossed and transmitted to Mrs. Bethune.

The Secretary reported the case of George E. Weir, with reference to whom an order was made on 18th November that his time had expired, his papers were now complete, and that he was entitled to his Certificate of Fitness.

Ordered, That Mr. Weir do receive his Certificate of Fitness pursuant to the order of 18th November.

The memorial of Louis De Souza, Esq., was read and received.

Ordered, That it be referred to the Legal Education Committee to enquire into and report upon the matter, and also further to report whether any, and if so, what rules, regulations, or by-laws should be made by the Law Society in respect of the call of persons called to the Bar by any of her Majesty's Supreme Courts of England, Scotland or Ireland.

Mr. Moss presented the report of the Legal Education Committee on the curriculum as follows:—

The Committee on Legal Education beg to report as follows:—

The committee have had under consideration the Curriculum for the Primary Examination for Students-at-Law and Articled Clerks, and recommend the accompanying curriculum for the years 1886 to 1890 inclusive for adoption by Convocation under Rule 23.

All which is respectfully submitted.

(Signed) CHARLES MOSS,
Chairman.

December 26th, 1884.

PRIMARY EXAMINATION CURRICULUM.

Students-at-Law.

CLASSICS.

1886	Cicero, Cato Major. Virgil, Æneid, B. I., vv. 1-304. Cæsar, Bellum Brittanicum. Xenophon, Anabasis, B. V. Homer, Iliad, B. VI.
1887	Xenophon, Anabasis, B. I. Homer, Iliad, B. VI. Cicero, In Catilinam, I. Virgil, Æneid, Book I. Cæsar, Bellum Brittanicum.
1888	Xenophon, Anabasis, B. I. Homer, Iliad, B. IV. Cæsar, B. G. I. (vv. 1 to 33). Cicero, In Catilinam I. Virgil, Æneid, B. I.
1889	Xenophon, Anabasis, B. II. Homer, Iliad, B. IV. Cicero, In Catilinam, I. Virgil, Æneid, B. V. Cæsar, B. G. I. (vv. 1 to 33).
1890	Xenophon, Anabasis, B. II. Homer, Iliad, B. VI. Cicero, In Catilinam, II. Virgil, Æneid, B. V. Cæsar, Bellum Brittanicum.

Translation from English into Latin prose, involving a knowledge of the first forty exercises in Bradley's, Arnold's composition and re-translation of single passages.

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

MATHEMATICS.

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

ENGLISH.

A paper on English Grammar.
Composition.
Critical reading of a Selected Poem:—

1886—Coleridge: Ancient Mariner and Christabel.
1887—Thomson: The Seasons, Autumn and Winter.
1888—Cowper: The Task, Bb. III. and IV.
1889—Scott: Lay of the Last Minstrel.
1890—Byron: The Prisoner of Chillon, Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3 inclusive.

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.

1886, 1888 and 1890	Souvestre un Philosophe sous les toits.
1887, 1889	Lamartine's Christophe Colombe.

or NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics, or Peck's Ganot's Popular Physics and Somerville's Physical Geography.

Articled Clerks.

Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

Cicero, Cato Major, or Virgil, Æneid, B. I., vv. 1-304, in the year 1886, and in the years 1887, 1888, 1889, 1890 the same portions of Cicero or Virgil, at the option of the candidate, as noted above for Students-at-Law.

The report was read and received. Ordered for immediate consideration and adopted.

Ordered, that the curriculum proposed in the report be the curriculum for the time mentioned therein.

A letter from A. O. Jeffrey, Secretary of the Middlesex Law Association, enclosing a report of that Association, was read.

Mr. Meredith's notice of motion on the subject of a Law School and Law Examiners was read.

Mr. Meredith moves that the subject-matter of his said notice of motion and the said letter and report be referred to the Legal Education Committee to consider and report, and that the Committee be requested to confer with the deputation appointed by the Middlesex Law Association. Carried.

Mr. Read's notice of motion on the subject of the Law School was read.

Mr. Read moved that the subject-matter of his resolution be referred to the Legal Education Committee. Carried.

Mr. Moss moved that Mr. Meredith be added as a member of the Legal Education Committee. Carried.

Ordered, that a call of the Bench be made for the first Tuesday of next Term for the election of a Bencher in the place of James Bethune, Esq., Q.C., deceased.

CANADA REPORTS.

ONTARIO.

COUNTY COURT OF NORTHUMBERLAND AND DURHAM.

(Reported by W. R. Riddell, Barrister-at-Law.)

HEARD v. HEWSON.

Replevin Act—R. S. O. c. 537, sec. 18—Capias in withernam, when to issue—"Eloigned."

Under an *ex parte* order a writ of replevin was issued, directing the sheriff to replevy to the plaintiff a certain mare. Before the execution of the writ by the Sheriff, the defendant had sold the mare; whereupon the Sheriff made the following return to the writ: "The goods, chattels and personal property in the within writ mentioned, viz.—one brown mare, cannot be found by me in the possession of the defendant herein. The defendant informs me that he sold the same, and does not know where it now is. I do not know where said property is, and cannot have a view of it to deliver it as I am herein commanded." On this return the plaintiff took out a writ of *capias in withernam*, following, *mutatis mutandis*, the form given as No. 3 in R. S. O. c. 53; instead of the words "eloigned by the said C. D. out of your county to places to you unknown," in form 3, were inserted the words "were sold by the said George Hewson, and that you do not know where the said property is, and cannot have a view of it to deliver it." Under this writ another mare of equal value with the former, and belonging to and in the possession of the defendant was seized by the Sheriff and delivered to the plaintiff.

Baines for the defendant obtained a summons to set aside the writ of *capias in withernam*, and the proceedings thereunder on the grounds:

1. That the return of the Sheriff to the writ of replevin did not warrant the issue of the writ of *capias in withernam*.

2. That the writ did not conform to the form required by the statute in that behalf.

3. That as appeared by affidavit the property to be replevied had not been eloigned by the defendant, but had been sold *bonâ-fide* and for good and valuable consideration, etc.

Riddell, for plaintiff, as to the first point relied upon F. N. B. ed. 1730, p. 157 [68] *le rit de replegiare de averiis G* (a); and referred, also, to Arch Q.B. Prac., 13th ed., pp. 891, 898.

As to the second point he referred to sec. 18 of R. S. O., c. 53, c. 18, which requires the writ of *capias in withernam* to be in the words or *to the effect* of Form 3, and the writ should conform to the actual return.

As to the third point he contended that "eloigned" here and elsewhere meant removed, whether *mala fide* or *bona fide*, and did not necessarily mean removed to avoid seizure.

Baines, contra.—"Eloigned" means removed *mala fide* and to avoid seizure, and the writ was never intended for such a case as this.

CLARK, Co. J., gave judgment to the following effect:—I can find no authority, and I have been referred to none, to bear out the contention that to warrant the issue of a *capias in withernam*, the property directed to be replevied must have been removed to avoid seizure. "Eloigned," *elongata*, means "removed"—the law dictionaries do not add "fraudulently," or words indicating *mala fides*. Fitzherbert is authority, if any were required, that the return of the sheriff to the writ of replevin warrants the issue of the *capias in withernam*. And the *capias* conforms to the actual return, which is what, I think, the Replevin Act, sec. 18, requires. The summons must be dismissed, with costs in the cause to the plaintiff in any event.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

SUPREME COURT OF CANADA.

SULTE v. THE CORPORATION OF THE CITY OF THREE RIVERS.

British North America Act, 1867, *secs.* 91, 92—*Liquor License Act of* 1878—41 *Vic. ch.* 3 (*P.Q.*)—*Powers of Local Legislature to regulate sale of intoxicating liquors—Delegation of power to Municipal Corporations*—41 *Vic. ch.* 3, *secs.* 36, 37, 255—*Construction of—By-law—Validity of*—20 *Vic. ch.* 129, *and* 38 *Vic. ch.* 76, *sec.* 75.

By a by-law passed by the Corporation of the City of Three Rivers on the 3rd of April, 1877, under the authority conferred upon them by the charter of the city, 20 Vic. ch. 129, and by 38 Vic. ch. 76, sec. 75, a license fee of $200 was imposed on persons who were desirous of obtaining a license to keep a saloon and sell intoxicating liquor.

By sec. 36, 41 Vic. ch. 3 (Q.), it is enacted that on each confirmation of a certificate for the purpose of obtaining a license for the cities of Quebec and Montreal, the sum of $8 is payable to the corporation of each of those cities, and by other corporations, for the same object, within the limits of their jurisdiction, a sum not exceeding $20 may be demanded.

Sec. 37 enacts, "The preceding provision does not deprive cities and incorporated towns of the rights which they have by their charters or by-laws."

Sec. 255 provides that "the dispositions of this Act shall in no way affect the rights and powers belonging to cities and incorporated towns by virtue of their charter and by-laws, and shall not have the effect of abrogating or repealing the same."

On the 31st of March, 1880, S. (appellant) filed with the Council of the Corporation of Three Rivers the certificate required by sec. 2 of 41 Vic. ch. 3 (Q.), and on their refusal to confirm the certificate except upon payment of the sum of $200 imposed by the by-law of the 7th April, 1877, he petitioned for a writ of mandamus to declare the by-law null, and that the officials of the Council be ordered to sign and deliver the certificate in question.

Held, affirming the judgment a quo that the provisions of the Liquor License Act, 1878, (P.Q.), are *intra vires* of the powers of the Legislature of the Province of Quebec. (See *Queen* v. *Hodge*, 9 App. Cas. 117.)

2nd. That the powers of sec. 37 excepts the by-law made on the 7th April, 1877, from the provision of sec. 36, and that the powers which the Corporation of Three Rivers has to impose license fees on the sale of intoxicating liquors in virtue of 21 Vict. ch. 109, and 38 Vict. ch. 76, have not been repealed by the Liquor License Act, 1878.

Doutre, Q.C., for appellants.

Denoncourt, Q.C., and *MacDougall* for respondents.

Appeal dismissed with costs.

CHANCERY DIVISION.

Proudfoot, J.] [October 27.

Re STANDARD FIRE INS. CO.

Winding up proceedings—Contributories.

Appeal from Master's report which placed certain parties on the list of stockholders as contributories to the extent of their unpaid stock.

CHISHOLM'S CASE.

C. having been communicated with by the president of the company, agreed to act as a director and gave his note for $500 in order to obtain a qualification. The president subscribed for fifty shares stock for him which would be the amount that the $500 note would pay ten per cent. on. C. then acted as a director for some time without (as he alleged) knowing that any stock had been subscribed for him. Subsequently he was notified of a five per cent. call on fifty shares, and he at once communicated with the president who told him not to mind and that the secretary would be instructed, and he was not troubled again about it. At this time his note had been carried by the company and he had paid nothing. The president then absconded and he was notified of a five per cent. call, and he gave a note for $250 in payment of same, not (as he alleged) because he was liable but because he was told that would settle his total liability, and he did not wish to enter into a suit.

Held, that he was properly placed upon the list of contributories.

TURNER'S CASE.

T. signed a power of attorney to C. to subscribe for twenty shares of stock and delivered it to him on the understanding that it was not to be used except he became a director of the company. C. directed the accountant to enter T.'s name in the stock ledger as a stockholder, which was done. Blotting pads were issued and an advertisement published in a newspaper and a return made to the government with T.'s name inserted as a director in the two former and as a member in the latter, but no board was ever formed with T. as a director. T. swore that he never saw the pads, advertisement or returns, and that he did not know his name was in any of them, and on receipt of a notice claiming a five per cent. call he at once repudiated all liability.

Held, that as T. made it a distinct stipulation that unless he was made a director the power of attorney was not to be used, he made such a stipulation a condition precedent to his becoming liable as a shareholder, and that the circumstances brought the case within the line of cases of which *In re National Equitable Provident Society, Wood's case* L. R. 15 Eq. 236 is an example, and that T.'s name must be removed from the list of contributories.

FINDLAY'S CASE.

Held, that F. was not properly a contributory on the same grounds and principle as in Turner's case.

BARBER'S CASE.

B. signed a power of attorney to subscribe for stock under the same circumstances as Turner, but was asked by letter to fix the time to suit himself to pay the ten per cent. call, and he added to the power a clause that the ten per cent. was to be payable in one year from date. He was also notified by the secretary of the company that he was a shareholder, and a notice of a meeting was sent to him. There was no evidence to show that he made his becoming a director a condition precedent to his becoming a shareholder.

Held, that the entry by the accountant of B.'s name as a stockholder was equivalent to an entry by C. to whom the power was given and was no delegation of any discretionary power, but a mere ministerial act.

Held, also following *National Insurance Co.* v *Egleson* 29 Gr. 406 that it was not material that the name was not entered in the subscription book or that there was no specific allotment of stock, and that B. was properly placed on the list of contributories.

COPP, CLARKE & CO.'S CASE.

This case was somewhat similar to Barber's case but there was an understanding that the calls were to be paid in work, and $100 worth of work was so done and credited in the books of the company, and C. C. and Co. printed the pads, saw the advertisement in the paper and received notices of calls.

Held, that C. C. and Co. were properly placed on the list of contributories.

CASTON'S CASE.

C. signed the power of attorney on the understanding that he was to be solicitor of the company in Toronto, and that he was to pay no cash on his stock but to get credit for his services. A certificate that he was a holder of ten shares was sent to him, and was in his possession for some years, and he was appointed solicitor under the seal of the company, received notices of meetings and calls and did not expressly repudiate his liability.

Held, that C. who was a professional gentleman, and should have known that it was necessary to have his shares cancelled, was properly placed upon the list of contributories.

Lash, Q.C., and *A. C. Galt*, for the appellants.

Bain, Q.C., for the liquidators.

Laidlaw, for the company.

Boyd, C.] [Dec. 17, 1884.

RE KERR, KERR v. KERR.

Will—Testator's estate to be valued by executors—Certain of the beneficiaries consulted as to valuers to exclusion of others.

A testator provided in his will that on the death of his widow his executors, who were two of his children, should have his farm valued, and gave permission to his son E. to take the

farm at that valuation, after which the proceeds were to be divided amongst all the other children.

On the death of the widow the executors did proceed to value the farm, but they asked E., who had made up his mind to keep the farm, to aid them in nominating three valuers, while none of the other children were notified of what was going on or asked to be present at the fixing of the valuers. There was no evidence that the valuers had reached their conclusion, other than in a legitimate and upright way. Certain of the children now impeaching the valuation and asking for administration:

Held, that there should be another valuation of the farm, and if the parties desired it, it might be referred to the master for that purpose, or the executors might on notice to all interested proceed to do what was needful in that behalf.

The three valuers who were called in were required to exercise in some sense judicial functions, and it would be contrary to first principles to let the one who was to purchase suggest or appoint his own nominees to fix the value without notice to those interested in getting the best price.

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

Boyd, C.] [Dec. 17, 1884.

GRAHAM v. WILLIAMS.

Mechanics' lien—R. S. O. c. 120—Right of lienholder against tenant to charge the land of the landlord.

G. supplied bricks to W., who had leased certain land from H., with the right to purchase on certain terms. The contract for the supply of the bricks was made between G. and W. and on W.'s credit; although H. was aware that they were being supplied and that a building was being erected on his property and he had agreed to supply two-thirds of the money required for the building by way of loan to W. on the security of the property. W. did not exercise his right of purchase and G. filed his lien against both W. and H. and brought an action to charge the interest of H. with the lien.

Held, that the Mechanics' Lien Act, R. S. O. c. 120, intended something more than the landlord's quiescence or acquiescence while the building is being erected in order to subject his land to the payment of his tenants' debts, and that in such a case the fee may be charged, but only when consent thereto is given in writing by the owner in fee. Under the circumstances it cannot be said the bricks were furnished on behalf of H. Without a consent in writing as provided by s. 6, s.-s. 2, his mere knowledge of what was being done would not make his estate liable if it turned out that the tenant W. was not able to complete his purchase. The work was not done "for his direct benefit." The Act contemplates direct dealing between the contractor and the owner, and the words, "touching privity and consent" in the interpretation clause are referable to the relations existing between the owner and sub-contractors and are not to be so expanded as to embrace the case of a proprietor who is cognizant of and encourages the improvement of the property by a person holding under him who has yet such an estate in the land that he is the owner within the meaning of the Act as to the contractor whom he employs. The agreement to supply money by way of a loan does not change the character of the transaction so as to place W. in the position of a mere agent of H.

O'Gara, Q.C., for the plaintiff.

Gormully, for the defendant Henry.

Full Court.] [Dec. 18, 1884.

BROOKES v. CONLEY ET AL.

Verbal agreement—Action to have same expressed in writing—Jurisdiction—Declaratory judgment.

In this action B. set up a verbal agreement entered into between himself and C., they being adjoining proprietors of land, to the effect that C. should build a house in such a position that the southern wall would encroach nine inches upon B.'s land, and B. was to be allowed at any time to use that wall as a party wall upon payment of half the expenses of its original erection by C. This agreement was verbal and was made in 1873, and shortly afterwards C. erected his building as agreed upon. B. began this action before the expiration of ten years from the date of the verbal agreement, and B. claimed that he was entitled to have the bargain put into writing and executed by C. so as to enable him to register it, and

asked a judgment declaring him entitled to all the rights and privileges contained in the verbal agreement or in the alternative for possession of the nine inches of his land which was covered by the wall of the building erected by C.

C. set up (amongst other defences) that whatever was done on the nine inches was done by the leave and license and at the express instance of B., and further that he never did, nor did he then, object to B. being allowed to build against and use the wall in question as a party wall, and that he had always acquiesced and conceded B.'s right so to do on payment of half the actual cost thereof.

Held, affirming the decision of FERGUSON, J. that under these circumstances the action must be dismissed.

B. had no ground for asking that the verbal agreement should be manifested in writing. No doubt he might be prejudiced if C.'s land was conveyed to a registered purchaser for value without notice of the agreement, and might also be prejudiced by the difficulty of preserving evidence to prove the oral agreement. The appropriate remedy for these possible wrongs would be a declaration of B.'s rights by virtue of the agreement, but, under the jurisprudence of England, there is no jurisdiction to ascertain and declare rights before a party interested has actually sustained damage. Here B.'s claim was virtually admitted, and it was open for him at any moment to make use of the wall as a party wall upon payment of half the costs.

Dickson, Q.C., for plaintiff.

Dougall, Q.C., for defendant.

Full Court.] [Dec. 18, 1884.

FITZGERALD v. WILSON ET AL.

Tax sale.

A tax sale of certain lands made on February 13th, 1882, was impeached on the grounds:—

1. No proper proof of taxes being due.

The evidence supplied was by the production and proof of the original non-resident collector's roll for 1877 in which this land appeared in arrear for $20.60. That was the only roll in which the land appeared for that year. Similar rolls were proved for 1878, with the taxes at $18.60, and for the year 1879, with taxes at $20.60. These sums with interest amounted to $76.92, to realize which the land was sold. Proof was also made of the due preparation of the warrant to sell, and the due advertising in the official gazette. It was not disputed that the land was properly dealt with as non-resident land during these years.

Held, that the proof was sufficient, for the rolls produced showed in truth, the very inception of the rates and taxes in question by the entries on the non-resident roll in pursuance of 32 Vict. c. 36, s. 92.

Chryler v. *McKay*, 5 S. C. R. 436 distinguished:

2. Because the warrant to sell was not addressed to any one.

The warrant recited that the treasurer had submitted to the warden the land liable to be sold and proceeded: "Now I, the warden, command you to levy," etc. This was given to the proper officer to sell, *i.e.*, the treasurer, was produced by him, and was acted on by him. The warrant purported to be drawn up pursuant to the authority given by 32 Vict. c. 36, s. 128.

Held, that the warrant as drawn up and acted on justified the sale. The Court will not be punctilious in adhering to the letter of the statute where there is reasonable accuracy, and no possible prejudice resulting from literal inaccuracy in the frame of the warrant to sell.

J. Maclennan, Q.C., for the plaintiff.

S. H. Blake, Q.C., and *Walsh*, for the defendants.

Full Court.] [December 19.

LANGTRY v. DUMOULIN.

Rectory endowments — Rectory Lands — 29-30 Vict. c. 16—Construction—Maintenance.

Certain land was granted by patent from the Crown dated December 26, 1817, to D. B., J. B. R. and W. A. as trustees for the sole use and benefit of the parishioners of the Town of York forever as a churchyard and burying ground for the inhabitants of the said Town of York, and appurtenant to the church then built thereon. This patent was surrendered to the Crown and another patent dated September 4, 1820, was issued to the same trustees reciting the terms of the former patent, and that it was intended that so much only of the said land as was necessary for the purposes of a churchyard and burying ground should be so appro-

priated and that such part of the said land as was not so required for the use of the parishioners should be held upon and for the trusts and uses thereinafter stated, which trusts were as follows: "In trust to hold the same for the sole use and benefit of the resident clergyman of the said Town of York, and his successors appointed or to be appointed Rectors of the Episcopal Church therein to which the said land is appurtenant, to make lease of the same with the assent of the incumbent, and to receive the rents due or to grow due therefrom to his use . . . and when a rectory was erected and an incumbent appointed . . the trustees should convey to such incumbent . . and his successors forever as a corporation sole to and for the same uses and upon the same trusts." Certain other lands were also granted by another patent from the Crown dated April 26th, 1819, to W. D. P., J. B. and J. S. upon trust to observe such directions and to consent to and allow such appropriation and disposition of them and to convey the same in such manner as should thereafter be directed by order in Council. These lands were subsequently conveyed by W. D. P., J. B. and J. S. to the other trustees, D. B., J. B. R. and W. A., by deed dated July 4th, 1825, reciting an Order-in-Council dated December 2nd, 1824, requiring the grantors to convey the said lands to the grantees for the use of the church and of the clergyman incumbent thereon for the time being (which recital was the only evidence of the contents of the Order-in-Council). "Upon trust nevertheless that the grantees should hold the lands for the sole use and benefit of the resident clergyman of the Town of York and his successors appointed or to be appointed incumbent of the parsonage or rectory of the Episcopal Church, according to the rites and ceremonies of the Church of England therein to which the said lands are appurtenant, which deed contained a proviso for conveyance by the trustees upon the erection of a parsonage or rectory and presentation thereto in the same terms as that contained in the patent of the 4th of September, 1820. The Town of York was subsequently incorporated as the City of Toronto, and by letters patent dated the 16th of January, 1836, a parsonage or rectory was erected and constituted in the said City of Toronto designated as the first parsonage or rectory within the Township of York, otherwise known as the parsonage or Rectory of St. James, and 800 acres of land were set apart as a glebe or endowment to be held appurtenant with the said parsonage or rectory and that the Hon. and Rev. J. S. was duly presented to be the incumbent of the said parsonage or Rectory of St. James, and by deed poll dated the 10th of February, 1841, reciting the patent of the 4th of September, 1820, the deed of the 4th of July, 1825, and the presentation of the Hon. and Rev. J. S., the said J. B. R., W. A. and J. G. S., the then trustees, granted the said lands described in the said patent and deed to the said the Hon. and Rev. J. S., Rector of St. James, and his successors in the said rectory forever as a corporation sole to and for the same uses and upon the same trusts as are mentioned and expressed in the said patent and deed. The Rev. H. J. G. succeeded the said Hon. and Rev. J. S. as incumbent on the 16th of February, 1847, and was in possession of the said lands and in receipt of the rents and profits thereof until the time of his death, which happened on the 20th of March, 1882. In a suit brought by the incumbents of several rectories which were subsequently erected in the said City of Toronto and the Synod of the Diocese to have the lands covered by the patent of 1820 and the deed of 1825 divided up under the provisions of 29 and 30 Vict. c. 16, it was

Held (sustaining the judgment of FERGUSON, J.), that the lands in question were covered by the terms of the Act. That prior to the year 1866 there were rectory lands derived directly from the Clergy Reserves and lands specially granted to trustees which were treated as endowments for rectories, and that the Legislature intended to deal with both classes. That the delivery up and cancellation of the patent of 1817 being to correct an error could not be held to be such a consideration as would make the patent of 1820 a grant for value. That Crown grants which were of a *quasi* public character were different from private gifts, and the Synod in the case of the former had petitioned for and obtained the power they desired. That 14-15 Vict. c. 175 sec. 2 (C. S. C. ch. 74) affords strong evidence that prior to the year 1866 there had been endowments for rectories out of the public domain as well as out of the clergy reserves.

After the hearing and before the appeal was

argued a motion was made to strike the case out of the list on the ground of maintenance, and it was shown that the defendant, the Rev. J. P. D., did not wish to proceed with this suit, but that as he was pressed to do so by his vestry and churchwardens he allowed his name to be used as appellant upon being indemnified by the latter as to costs.

Per BOYD, C. There was maintenance in the suit, but not in the criminal sense. The vestry and churchwardens have so intermeddled in the litigation that their conduct savours of maintenance. Their claim, if anything is antagonistic to the defendant, the Rev. J. P. D., and not a common interest. The Court should not allow strangers to come in and promote an appeal when the defendant does not wish it.

Per PROUDFOOT, J. The churchwardens cannot be held liable to the objection of maintenance. There were various ways in which the success of the defendant, the Rev. J. P. D., would be beneficial to them, and they believed they had an interest in the result of the action.

H. Cameron, Q.C., *Maclennan*, Q.C., and *Moss*, Q.C., for the plaintiffs.

Howland and *H. D. Gamble*, for defendant Dumoulin.

A. Hoskin, Q.C., for the township rectors.

E. D. Armour, for the defendants, Darling and H. G. Baldwin.

Divisional Court.] [December 23, 1884.

ROSS v. MALONE.

Sale of lands by sheriff before return of fi. fa. goods —Irregularity—43 Geo. III. c. 1—R.S.O. c. 66.

Held (sustaining the judgment of FERGUSON, J.), *Doe dem Spafford* v. *Brown*, 3 O. S. 95, and *Ontario Bank* v. *Kirby*, 16 C. P. 35 decided under 43 Geo. III. c. 1 that the issue of an execution against lands before the return of an execution against goods is an irregularity and not a void proceeding, and that that is the law under R. S. O. c. 66, the provision of each Statute seeming to be as nearly equivalent as language can make them without using the same words.

Lount, Q.C., for the plaintiff who appealed.

Pepler, for the defendant Boys.

H. Lennox, for the defendan Giffin.

MASTER'S OFFICE.

Mr. Hodgins, Q.C.] [October

STEWART v. DICK.

Will—Legacy—Charge on real estate.

A testator devised his real estate and chattel property (excepting some specific bequests to his wife) to his son Robert subject to the payment of his just debts, funeral expenses and certain specified legacies.

By a codicil he directed the chattel property (except the specific bequests to his wife) to be sold and the proceeds equally divided amongst all his children.

Held, the specific legacies were a charge on the real estate.

G. H. Watson, for the legatees.

Bain, Q.C., contra.

PRACTICE.

Mr. Hodgins, Q.C.] [November.

CLARK v. UNION FIRE INSURANCE CO.

CHABOT'S CASE.

Production—Foreign commission.

Books and documents produced in an action may, where a proper case is made out, be sent out of the jurisdiction for the purpose of the examination of witnesses before a foreign commission.

But documents produced in another action which is *subjudice* will not be taken from the office for such a purpose.

R. S. Cassels, for the applicant.

W. A. Foster, for the plaintiff.

Mr. Hodgins, Q.C.J [November.

RE QUEEN CITY REFINING CO.

Insolvent company—Winding up—Jurisdiction of judicial officers named in 47 Vict. (D) ch 39—Delegation of their powers.

The Dominion Insolvent Companies' Act, 45 Vict. c. 23, as amended by 47 Vict. c. 39 authorizes the Master in Chambers, the Master in Ordinary, or any local master or referee to exercise the powers conferred upon the Court

in Ontario, for the purpose of winding up insolvent companies. The Master in Chambers, as one of the judicial officers named in the Act, made an order for the winding up of an insolvent company, and referred it to the Master in Ordinary to settle the list of contributories, take all necessary accounts, make all necessary inquiries and reports, and generally to do all necessary acts, matters, and thanks for the winding up of the business of the said company.

Held, (1) that the powers vested in the judicial officers named in the Act were conferred upon them as *personæ designata* which they were not authorized to delegate to others or to each other. (2) That the reference was not authorized by the Judicature Act, or rules, or the prior Acts and rules conferring jurisdiction upon the judicial officers in Chambers. (3) That the jurisdiction of the Master in Ordinary under the order of reference would be a delegated jurisdiction, as the substitute or deputy of the Master in Chambers, and not the co-ordinate jurisdiction conferred upon his office by the Act. (4) That the order of reference was not therefore warranted by the Dominion or Provincial Acts, and could not be proceeded on.

A judicial officer cannot delegate the discharge of his judicial functions to another, unless expressly empowered so to do.

All that can be referred to an official referee under s. 47 O. J. A., is a question or questions for inquiry and report, and under s. 48 is an issue or issues for trial. The whole action, facts and law cannot be referred.

T. P. Galt, for the petitioner.

RULES OF THE SUPREME COURT OF ONTARIO.

The following Orders have been passed dated December 15th, 1884:—

545. For the purpose of equalizing the business in the several Divisions of the High Court:

From and after the first day of January, 1885, all writs of summons for the commencement of actions shall be issued by the officers who now issue like writs in the Queen's Bench and Common Pleas Divisions of the said High Court of Justice, and shall be issued alternately in the Queen's Bench, Chancery and Common Pleas Divisions of the said High Court. Writs issued by a deputy clerk of the Crown and Pleas, or a local registrar need not be signed or sealed by the clerk of the process.

546. All proceedings in actions to final judgment shall be carried on in that office in the same county where the writ of summons was issued, in which by the memorandum subscribed on the writ or by the notice of the writ the appearance is required to be entered, except where by any rule of the Court it may be otherwise provided, or where the Court or a Judge shall otherwise direct.

547. The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy of such writ, and of all the endorsements thereon. Such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person. When the writ is issued in the Chancery Division of the High Court by the clerk of the process, such copy shall be forthwith transmitted by him to the clerk of records and writs. Where a writ is issued in the said division by a deputy clerk of the Crown and Pleas, such copy shall be forthwith transmitted by him to the deputy registrar, in whose office the appearance is required to be entered.

Marginal rules 21, 25 and 50 are hereby repealed.

548. Rule 420 is hereby amended by adding thereto the following provisions:—"And in addition thereto shall be and hereby is empowered and required to do all such things, transact all such business, and exercise all such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the rules of practice of the said courts, or any of them, respectively were at the time of the passing of the Acts 33 Vic. (O.), cap. 11, 37 Vic. (O.), cap 7—the Ontario Judicature Act, 1881—and are now done, transacted, or exercised by any Judge of the said Courts sitting at Chambers, save and except in respect to matters excepted by the sub-section (*a*) of said rule."

549. Rule 543 is hereby repealed and the following substituted therefor:—In actions in the High Court of Justice no reference to arbitration o other reference or examination for the purpos of discovery, or examination of a judgment debtor on which fees may be payable otherwise than in law stamps, shall be taken before the Judge of the County Court, or local Judge of the High Court, or local Master being also a Judge of the County Court, by whom the order or appointment for such reference or examination has been made.

References in administration matters under General Order 638 of the Court of Chancery, and in partition matters under General Order 648 of the Court of Chancery, and other like references in mortgage actions are excepted from the operation of this rule.