MEREDITH, C.J., ROSE J., MACMAHON, J. [Feb. 29.

IN RE COCKBURN.

Way—Easement—Implication—Prescription—Interruption—Unity of possession—Unity of seizin—"Lost grant"—Tenancy—Estoppel.

A testator dying in 1874 devised adjoining lots of land, 4 and 5, to his two sons respectively. House No. 9 stood mainly on lot 4, but also partly on lot 5, and house No. 13 stood on the remainder of lot 5, there being a passage-way between the two houses, used in common by the occupants of both for the purpose of getting in wood and coal and getting out ashes. The appellant had, it was admitted, by virtue of a conveyance from the devisee of lot 4 and by the Statute of Limitations, acquired title to the portion of lot 5 on which house No. 9 stood.

Held, that a right of way over the passage between the two houses did not pass by implication of law to the devisee of lot 4.

The passage in question was used by the occupants of house No. 9 from the time of the death of the testator until 1895, but during the period from March to June, 1884, the owner of No. 13 was also the tenant of No. 9.

Held, per MEREDITH, C.J., that the unity of possession during that period would interrupt the running of the statute, and the appellant had not acquired a right of way as an easement by prescription under R.S.O. c. 111, sec. 35.

Dictum of HATHERLY, L.C., in *Ladyman* v. *Graves*, L.R.. 6 Ch. 768, not followed.

But, per Curiam, that at all events the locus in question could not be treated as a way to lot 4 ; it was rather a way to that portion of lot 5 on which house No. 9 stood ; and there being unity of seizin of the alleged dominant and servient tenements in the devisee of lot 5, no easement could exist while that unity continued ; and therefore the enjoyment of the way as an easement began only when the title of the devisee of lot 5 to that portion of it on which house No. 9 stood became extinguished by the statute, which was less than twenty years before this litigation.

Semble, per MEREDITH, C.J., that but for this latter circumstance, the claim of the appellant might have been sustained by the application of the doctrine of "lost grant."

And also, that the respondent, by reason of his tenancy of house No. 9, was estopped from asserting that his possession of the land of which he was tenant, and his user of the way which was enjoyed in connection with it, were other than a possession and user by him as tenant.

Shepley, Q.C., for the appellant.

W. M. Clark, Q.C., for the respondent.

ARMOUR, C.J., STREET, J. FALCONBRIDGE, J. [March 26.

IN RE WILLIAMS.

Executors—Payments by—Promissory notes—Consideration—Gifts—53 Vict., c. 33, sec. 30 (D.)—R.S.O., c. 110, sec. 31.

Upon appeal from the order of a Surrogate Court upon the passing of executors' accounts,