DIARY FOR SEPTEMBER.

1. Sat. ...Law Society Convocation meets.
2. SUN..14*th Sunday after Trinity.*
4. Tues..Napoleon III. deposed, 1870.
5. Wed..Lord Metcalfe, Gov.-General, died, 1846.
7. Fri....Sir George Simpson, H. B. Co., died 1860. Law Society Convocation meets.
8. Sat. ...Trinity term ends.
9. SUN..15*th Sunday after Trinity.*
11. Tues..General Sessions and County Court sittings for York.
12. Wed..Frontenac, Governor of Canada.
13. Thur..Quebec taken by British under General Wolfe, 1759.
14. Fri. ...Jacques Cartier arrived at Quebec, 1535.
16. SUN..16*th Sunday after Trinity.* Atlantic cable opened, 1858.
17. Mon..First Upper Canada Parliament met at Niagara, 1792.
19. Wed..Lord Sydenham, Gov.-General, died, 1841.
23. SUN..17*th Sunday after Trinity.*
24. Mon..Guy Carleton, Lieut.-Governor and Commander in-Chief, 1766.
30. SUN..18*th Sunday after Trinity.* Sir I. Brock, Pres., 1811.

CONTENTS.

THE

Canada Law Journal.

Toronto, September, 1877.

Questions very often arise before special examiners as to the powers they possess of excluding persons who wish to be present at the examinations. In *In re Western of Canada Oil Lands, &c. Company*, 25 W. R. 787, the Master of the Rolls held that the examiner's office is simply a private room, and that he has no discretion to admit any persons other than the parties, their solicitors, counsel, and agents.

We commend the action of the Court of Chancery in extending vacation to the end of August. This gives a two months pause during the summer when fagged brains and bodies can rest and recruit. It might be well, however, to change the time so that vacation would generally include the hot weather, say from the middle of July till the middle of September. This would somewhat disarrange the fall circuits, but with the present conveniences for travel, there is no good reason why some of this business should not be attended to during the winter months.

A FEW MORE WORDS ON DOWER.

Our correspondent, E. D. A., in his excellent letter published in our last number is quite correct in his reading of *Acre* v. *Livingstone*. That case is not so much of consequence upon the question of the interest of the widow before assignment of dower, as upon the legal operation and effect of a "quit-claim" deed. Our position in the article referred to was that the widow had no legal estate before assign-

ment, and we did not intend to intimate that the law was unsettled on that point.

But we return to the subject of dower not so much for the sake of setting right what might be left to right itself as to call attention to the fact that the case of *Dawson* v. *Bank of Whitehaven*, L. R. 4 Ch. D. 639, has been reversed by a very strong Court of Appeal, consisting of Jessel, M.R., and James and Cotton, L.JJ. The Court of Appeal held that when the widow bars her dower in a mortgage made by the husband for his own benefit, her right to dower is absolutely gone at law, and that, as in England, no dower attaches to an equitable estate; and, as she has voluntarily concurred in changing the husband's estate from a legal to an equitable one, she has no equity to claim dower after the satisfaction of the mortgage out of the lands so pledged. The Court of Appeal also dealt with the argument that the wife became a surety for the debt, and that therefore when the debt was paid she became entitled to the benefit of the security obtained by the creditor from the husband, the principal debtor. It was answered that as the wife's right was extinguished she did not pledge any estate for her husband's debt, nor did she make herself personally liable for it. The full text of the appellate decision is not yet published, and we have but seen a note of it in 21 Sol. J. 749. It may be that the Consolidated Statute giving the widow dower in an equitable estate of which the husband dies seized will render some of the reasoning of the judges in appeal inapplicable to the circumstances of this country. But of this it would be premature to speak, till the decision is properly reported at length.

THE COURT OF APPEAL UPON THE ADMINISTRATION OF JUSTICE ACT.

The Court of Appeal, (consisting of Hagarty, C.J. C.P., and Burton, Patterson, and Moss, JJ.), have in the case of *St. Michael's College* v. *Merrick*, expressed a unanimous opinion upon the construction of the Administration of Justice Act of 1873. In substance that opinion accords with the views which have from time to time been expressed in the pages of this journal. The Court hold that that Act was not intended to abrogate any of the former jurisdiction of the Court of Chancery—that its provisions are permissive and not compulsory—and that consequently a line of decisions to the contrary is no longer to be regarded as law. The excellent service rendered by the Court of Appeal in *Davidson* v. *Ross*, in dissipating the subtleties of the doctrine of pressure in cases of fraudulent preference, has been substantially repeated in clearing away the jungle of perplexity which was over-running the sections of this Act.

A person sued who has an equitable defence may now, as before the statute, elect to set up his defence at law, or may file a bill to restrain the action at law on equitable grounds. But it is held that when once judgment is recovered, that is conclusive, not only as to legal, but as to equitable defences which either were raised, or might have been raised, in the particular action. Whether the Court of Appeal intend this to apply to actions of ejectment is not plainly expressed. If so the case of *Demorest* v. *Helms*, 22 Gr. 433, still is law, a conclusion which we are very loth to accept. But it is quiet clear that among the decisions overruled by this judgment are the cases of *McCabe* v. *Wragg*, 21 Gr. 97, and *French* v. *Taylor*, 23 Gr. 436, while the *ratio decidendi* in *Henderson* v. *Watson*, 23 Gr. 355, and

Victoria Insurance Company v. *Bethune*, ib. 569, cannot be any longer supported. Nor can the case of *Kennedy* v. *Bown*, 21 Gr. 95, be considered as an authority, especially when taken in connection with the reasoning in *Falls* v. *Powell*, 20 Gr. 461.

The Court of Appeal further hold that after judgment is recovered at law, it is optional with the plaintiff, who seeks equitable execution or the like, to proceed summarily in the action, or to file a bill in equity as aforetime. This strikes at the authority of *Knox* v. *Travers*, 23 Gr. 91, and renders *Sawyers* v. *Linton*, ib. 43, an unnecessary, as it has always been an unsatisfactory, decision.

We are satisfied that the Court of Appeal have given the true interpretation to this much canvassed statute. By making the Act permissive, the Court do not give license to additional litigation, but only sanction it where it is more convenient that the equitable rights of the parties should be determined by plenary suit in Chancery, than by comprehending them in a suit at law. There is always the power to punish the unnecessary commencement of a suit by the provisions of the 48th section, whereby costs may be diminished to the quantum allowed in the least expensive forum, and a set off may be directed of the additional costs incurred by the adversary.

As we understand the judgment of the Court of Appeal, that Court is disposed to limit the rights to add third persons as parties to cases where these strangers are interested in the questions arising in the suit between the parties thereto. But the section of the statute relating to this matter (sec. 8) is not very fully or explicitly dealt with. Questions of serious difficulty arise as to the scope of the language used; and the decisions in England upon analogous provisions of the Judicature Act are remarkable for the divergence of judicial opinion presented therein.

DIVISION COURTS.

There has lately been sent to us a report of the Inspector of the Division Courts in Ontario, laid before the Local Legislature last session. Though rather late in coming to hand, we purpose noticing a few of the items of interest to the general reader to be found in it.

The chief information it gives is that shewing the amount of business done in the Division Courts of this Province for six months of the year past, commencing 1st of May. A table shews the number of suits entered during that period in each County (with the exception of a few Courts from which no returns had been received), and the amount of claims involved in these suits.

By taking the average to supply the missing returns, we are able to arrive at a fair estimate of the year's work in these Courts. To do this, however, we have to double the figures given for the six months, and as those six months are the Summer ones, it will be evident that our estimate must be, if anything, below the mark, inasmuch as more work is done in those Courts, as in all others, during the Winter months.

A few words, to premise, before we come to figures: The number of Counties and united Counties in Ontario is 36, exclusive of Districts, which do not enter into the present calculation. The number of Division Courts in these 36 Counties is 270; or, an average of nearly 8 to each County. The actual number in each County varies from four to twelve (the highest number allowed by the Act). In seventeen Counties the number of Courts is above the average, in the remaining nineteen, the number is below the average. In five Counties only is the full number of twelve established.

Taking now the figures in Mr. Dickey's report, and allowing for the Courts from which no returns have been obtained, we

arrive at the following results for the above six months :

Total number of suits entered	38,250
Total amount of claims therein	$1,125,404

Doubling these we get for the *year*.

Number of suits entered	76,500
Amount of claims involved	$2,250,808

From these figures we adduce the following :

Average number of suits for each County	2,125
" " " Court	283
" amount of claims for each County	$62,523
" " " Court	8,337

In sixteen Counties the number of suits is above the average (2125), ranging from 5550 down to 2152.

In the remaining twenty, the number is below the average, ranging from 1976 down to 562.

In twelve counties, the total of claims involved is above the average ($62,523) varying from $209,350, down to $64,868.

In twenty-four Counties, the total claims is below the average, ranging from $59,686 down to $20,352.

While the average number of suits in each County is 2125, and the average of claims involved $62,523, we see in one County as many as 5550 suits entered, claims to the extent of $209,850 ; in another, only 562 suits, for $20,352.

These are the extremes ; still the contrast is very great, even if we take, say, the highest three and the lowest three Counties, which are :

York	5550 suits.	—Claims	$209,850
Simcoe	4976 "	"	149,730
Northumberland and Durham	3516 "	"	110,394
Prince Edward	904 suits.	—Claims	$22,970
Carleton	866 "	"	25,670
Peel	562 "	"	20,352

Our own County (York) stands, of course, at the head of the list, containing, as it does, the City of Toronto with upwards of 70,000 inhabitants, but, while it heads Simcoe, the second on the list, by less than 600 suits, we are surprised to find that County (Simcoe) with nearly 1500 more than the next below it on the list.

We see then, that even at the very lowest calculation, claims to the extent of at least *two and a quarter millions of dollars* are adjudicated upon in the Ontario Division Courts during the year. So much for figures.

On glancing at the report we find allusion made by the Inspector to the question of the differences in the taxation of costs existing between some of the Clerks of these Courts. Uniformity and certainty are very much to be desired ; but while a tariff of fees has been prepared by authority, there must of course be cases where questions of cost come up, for which no provision is made. In such cases, as well as in all others, there is an appeal to the Judge, and if, as we understand is the case, constant correspondence and communication is taking place between the County Judges, as well by letter as at their annual meeting in June, on all questions affecting the practice and conduct of their Courts, there is no doubt that in a short time, uniformity and certainty will be secured. The Inspector alludes to the "self-interest" of the Clerks in these matters as interfering with their understanding of the tariff, but where, we ask, is it otherwise, where officials are paid by fees and not by salary? The same accusation might be made against Sheriffs, the Clerks of the higher Courts, Bailiffs, &c., and it amounts simply to a charge of giving themselves the "benefit of the doubt." Every day, with each of these officials, a case arises where something or other has to be done for which no renumeration is provided.

The fact is that the remarks of the Inspector point to this, that the system of payment by fees is a most pernicious one, and the sooner it is done away with the better for all parties. No doubt the payment of all Division Court Clerks, for instance, by a uniform salary, would

be inequitable, but the end might be accomplished. by making the salary dependent either upon the number of suits entered, or upon the amount of claims involved.

On page three of the Report, we find the Inspector saying, "When judgment has been rendered against the primary debtor and garnishee at the same sittings, and in the same minute of judgment, two fees have been taxed as for separate judgments, when in fact there is only one judgment of the Court * * *These practices are contrary to law, and are disallowed by me."

By the expression "contrary to law," we presume is meant, unauthorized by the practice. The Inspector's opinion on this point, however, is, as we are informed, at variance with that of some of the older and more experienced County Judges who have, since the Garnishee Act was passed, directed and sanctioned the contrary practice. Looking cursorily at it, we fail to see how a decision between the primary creditor and primary debtor, whose dispute may be about a horse, has anything to do with that between the primary debtor and the garnishee, the latter being charged as owing the former for a cow. As a fact, we are informed that in some counties, the two decisions are rarely, if ever, given at the same sittings — the primary creditor being seldom prepared to prove the indebtedness of the garnishee, relying on his not denying it, or on his paying money into Court. In such a case, that is, when an adjournment takes place as to the garnishee, the two decisions clearly do not make one judgment; that against the primary debtor is complete in itself, and becomes a judgment at once. Why then should the contrary be the case merely because the two decisions are given at different times on the same day, instead of on different days. A decision on a claim against a primary debtor, pronounced in open Court, becomes at once a judgment. And it seems to us most unlikely that a judge should delay in pronouncing judgment against a primary debtor, until he ascertained whether a third party were indebted to him. It is only where he does so, that the case could possibly come within the words used by the Inspector "in the same minute of judgment," which may be another way of saying, "in the one adjudication."

If the two make *one judgment*, how about the separate executions which it may be necessary to issue at the same time? and if the plaintiff is nonsuited as against the garnishee, but recover against the primary debtor, in whose favour could the judgment be said to be? The case is unlike that where several issues between the same parties are decided differently. Again it is competent for the Judge, as against *one* party only, to set aside the judgment and make an order for a new trial, or for a nonsuit, leaving the other part of the adjudication intact; this also points strongly to the view that there can be two judgments resulting from the complex procedure under the garnishing clauses of the act.

SELECTIONS.

CURIOSITIES OF ENGLISH LAW.

CONDITIONS IN RESTRAINT OF MARRIAGE.

We now propose to review a branch of the law which, if it were on no other account open to comment, would be abundantly worthy of notice as having given rise to a most remarkable rule of Construction.

This rule of construction, commonly known as the doctrine of conditions *in terrorem*, may be shortly stated as follows:—Where a testator attaches to his bounty a condition of forfeiture on marriage, the Court often refuses to construe his words according to their natural meaning, and holds that he did not really

intend the threatened forfeiture to take effect, but only inserted the condition in the hope that the legatee by taking an erroneous view of his intentions might be intimidated into remaining single.

We believe no one has succeeded in discovering when this doctrine which traces its origin to the Civil Law first became naturalized in this country. Like the family of Douglas, there never seems to have been a time when it did not flourish. We never come across it in an embryo state; on the very first introduction we are presented to it in a high state of development as an incontestible dogma. Yet so long ago as the leading case of *Scott* v. *Tyler*, it was spoken of very disrespectfully both by the judge and by some of the principal counsel of the day, and since that time its position has by no means improved.

It is no doubt a matter of congratulation that the Judges have, in this instance, been content simply to perpetuate a time-honoured doctrine which has been universally condemned for a century, and have not thought it necessary (as is often the case) to add to the sanction of antiquity the weight of their own approbation. The vigorous assaults on the part of the highest functionaries of the law to which this devoted doctrine has been subjected, certainly affords a gratifying spectacle of judicial independence. Lord Thurlow in *Scott* v. *Tyler*, after referring to some early cases, observes, "I do not find it was ever seriously supposed to have been the testator's intention to hold out the terror of that which he never meant should happen,"* and for a modern exposition of judicial opinion on the doctrine, it will be sufficient to refer to the judgment of Jessel, M. R., in *Bellairs* v. *Bellairs* (L.R. 18, Eq. 510), in which he follows the current of authority with extreme reluctance. Satisfactory as it is to find that the undisguised opinion of the Judges is in this instance not opposed to the plain dictates of common sense, we may well feel some little disappointment when we reflect that a doctrine, on the face of it utterly absurd, which has been energetically condemned by the highest legal authority nearly a century ago, should still be permitted to flourish in undiminished vigour. The vitality of legal abuses must indeed be great, if such a one as this can escape the raid of Law Reformers uninjured. Without a friend in the world, planted no one knows how or why, it exists simply because it has existed. Possibly like the need in the fable, its very weakness constitutes its strength. There is, it may be, a kind of chivalrous feeling in the breasts of Law Reformers, impelling them "*parcere subjectis et debellare superbos*," that is, to spare the small game, and direct their attacks at those large and terrible abuses which have influential defenders and die hard. We know that the satisfaction arising from the successful issue of an enterprise, depends principally upon a sense of the difficulties which have had to be surmounted, and we can quite understand that the feeling of triumph, to say nothing of an increased meed of popular applause, occasioned by a hotly-contested victory, affords a much keener source of gratification to the victor than the discomfiture of a feeble enemy.

A rat-catcher may be more usefully employed than a lion-hunter, but his occupation is not held in the same estimation. In this respect, the Law Reformer is no exception to the general rule. He feels as keen a delight as any other naturally combative person in meeting "a foeman worthy of his steel." To fight the powers that be, to try a fall with the Attorney and Solicitor-General, to brave the invectives of the Lord Chancellor, and the contemptuous sneers of the senior members of the Bar—this is indeed an inspiriting contest, defeat is no dishonour and victory inexpressibly glorious. How humble in comparison is the position of the mere Scavenger of Reform, he who quietly removes a nuisance the retention of which is a matter of indifference to the highest legal authorities. Too many of us aim rather at being famous than useful, and hence we can understand how it happens that an abuse may owe its vitality to the mere fact that it is too utterly rotten for any human being to defend, and we venture to think that no better illustration of the truth of this paradox can be found than in the continued existence of the Doctrine of Conditions *in terrorem*.

Having once firmly established the doc-

* See also the observations of Lord Mansfield, in *Long* v. *Dennis*, 4 Burr 2055.

trine that persons are in the habit of endeavouring to regulate the conduct of their legatees by purporting to impose penalties which they do not intend to be enforced, and which those legatees may discover from the nearest attorney to be a mere dead letter, it may be a question whether the judges might not, with advantage, have abandoned altogether the transparent pretext of trying to discover the real intention of the testator. The solution they arrived at as to the meaning of the testator's words being, in most cases, obviously opposed to common sense, one would scarcely have thought it worth their while by refining on their canons of construction to render that solution more difficult to forecast. However, various refinements have, as we all know, been engrafted on the primitive doctrine until the decisions of the Court have become extremely difficult to forecast. First a distinction has been taken between those cases in which a testator has merely declared that an interest given to a person shall cease on marriage, without any direction as to the disposition of the fund in that event, and those cases in which there is an express bequest over of the forfeited interest. The judicial mind has been much exercised as to the ground of this distinction. Sir William Grant, M.R., in *Lloyd* v. *Pranton* (3 Mer. 117), observed, "Different reasons have been assigned by different Judges for the operation of a devise over. Some have said that it afforded a clear manifestation of the intention of the testator not to make the declaration of the forfeiture merely *in terrorem*, which might otherwise have been presumed. Others have said that it was the interest of the devisee over which made the difference, and that the clause ceased to be merely a condition of forfeiture, and became a conditional limitation, to which the Court was bound to give effect."

We do not propose to comment on the judicial doubts as to this knotty point; it will be sufficient to observe that the distinction in question, whatever may be its origin, or on whatever grounds it may be upheld, has, in its application, given rise to a good deal of litigation, owing to a difference of opinion among the Judges as to whether or not a residuary bequest amounts to a sufficient bequest over to oust the *in terrorem* doctrine. Sir William Grant in the last-mentioned case, without venturing to give a positive opinion as to the effect of a simple residuary bequest, decided that a direction that the forfeited bequests should fall into the residue was as effectual as an express bequest over, and although the better opinion would seem to be that a simple residuary bequest does not amount to a bequest over, the point can hardly be said to be free from doubt.

We see then that the first limitation placed to the doctrine of conditions *in terrorem* has given rise to a doubt that is still *sub judice*.

The effect of an alternative bequest has also furnished abundant matter for controversy. If the Judges had been actuated by any *bonâ fide* desires to carry the wishes of testators into effect, it is difficult to see on what ground they should have refused to an alternative bequest the same weight as an indication of intention which they accorded to a bequest over. If a man is held to have sufficiently expressed an intention to enforce the threatened terrors of forfeiture by indicating the objects of his bounty in the event of his forfeiture taking effect, surely his intention not to rely upon any idle threat remains equally manifest if he takes the trouble to make out an alternative scheme, and, instead of naming other objects of his bounty, proceeds to apportion the relative wages of obedience and contumacy. However, it was settled by Lord Hardwicke (*Wheeler* v. *Bingham*, 3 Atk. 364), that an alternative provision in the event of non-compliance with the conditions of celibacy, on which the original bequest was granted, whether such alternative provision was settled by the testator himself, or left to the discretion of others, was not sufficient to oust the doctrine of *in terrorem*. But although the authority of that decision has, we believe, never been questioned, nevertheless it would be wrong to infer that the insertion of an alternative bequest may be left out of consideration in determining the effect to be attributed to a clause of forfeiture. Such a bequest may produce, in a different way, precisely the same effect, as regards the threatened legatee, as a bequest over may. Sometimes it will be efficacious to his detriment when a bequest over would have been innocuous, for the tendency of modern decisions has been

to consider alternative bequests in the light of *limitations* (which are valid even when in *general* restraint of marriage) rather than conditions. These cases on this head (which contain extremely thin distinctions, and are very difficult to reconcile) we will refrain from discussing until we come to consider the question of limitations as distinguished from conditions.

We have said quite enough to show that the *in terrorem* doctrine has occasioned a great deal of doubt and difficulty, but the most perplexing question of all in relation to that doctrine has still to be investigated, namely, whether the doctrine does or does not apply to conditions precedent. In the first place, it is sometimes by no means an easy matter to distinguish a condition precedent from a condition subsequent. We find it stated in a very early case (*Robinson* v. *Comyns*, Ca. Temp. Talbot, 166), that "There are no technical words to distinguish conditions precedent and subsequent, but the same words may indifferently make either, according to the intent of the person who creates it." After this not very encouraging announcement, it is not surprising to find that a large proportion of the cases on Conditions in Restraint of Marriage, contain more or less elaborate arguments, with the object of showing that what would appear *primâ facie* to be a condition precedent, is really a condition subsequent, and *vice versa*. At first sight, the distinction between the two classes of condition seems both simple and substantial. The one class we are told, operates by way of raising an interest, the other by adeeming a benefit already confirmed. In practice, however, it was soon discovered that the distinction was anything but simple, and still less can it be said to be substantial. In fact, we do not hesitate to record our conviction that this distinction is, with regard to the subject under discussion, as vicious as it is perplexing. If we inquire into the probable reasons which determine a testator in his choice between the two classes of conditions, it will in most instances clearly appear that he was actuated by motives which have no bearing whatever on the question of whether or not he wished his conditions to be enforced. It is a mistake to suppose (as the Judges seem to do) that a testator puts a prohibition or injunction, in the form of a condition subsequent, when he is comparatively indifferent as to whether his wishes are attended to or not, and in the form of a condition precedent, only when he is really anxious to be obeyed, this is not so; he makes use of the one form or the other, for no other reason than because in the state of circumstances that he has to deal with, it happens to afford the simplest expression of his wishes. Suppose, for instance, that a testator simply desires to make a provision for his daughter *on her marriage with her mother's consent*, in such a case, he would naturally carry his intention into effect through the medium of a condition precedent, if, on the other hand, he wishes to make the provision in favour of his daughter to take effect *immediately* after his death, he will probably leave an annuity to his daughter, with the condition that it shall cease or go over if she marries without her mother's consent. This is of course a condition subsequent, but it cannot be supposed that the testator is less anxious in the one case than in the other to prevent his daughter from making an imprudent match. Yet the form of expression may be of the utmost importance, for there is a good deal of authority for the proposition that the doctrine of *in terrorem* applies exclusively to conditions subsequent. However, this is a doubtful point, and may, perhaps, even yet occasion plenty of litigation before it is finally settled.

We have now only one more modification of the *in terrorem* doctrine to deal with. This last modification, while more palpably absurd than any we have hither to discussed, has the great advantage of simplicity. It has been gravely decided that the intention of a testator varies according to the nature of the property with which he purports to deal, and that the very same words which, if he were dealing with personal estate, would be held inoperative to defeat a previous gift, will, if referable to real estate, effectually put an end to the interest of the devisee. This remarkable distinction, and that between conditions precedent and subsequent, experienced rough treatment at the hands of Lord Rosslyn, in the well-known case of *Stackpole* v. *Beaumont*.

His Lordship observes (3 Ves. 95), "It is impossible to reconcile the authorites, or range them under one sensible, plain, general rule. There can be no ground in the construction of legacies for a distinction between legacies out of personal and out of real estate. The construction ought to be precisely the same. I do not see more importance in reality in the distinction between conditions precedent and subsequent. The case of all these questions is plainly this: In deciding questions that arise upon legacies out of land, the Court very properly followed the rule that the Common Law prescribes, and common sense supports, to hold the condition binding where it is not illegal. Where it is illegal the condition would be rejected, and the gift pure. When the rule came to be applied to personal estate, the Court felt the difficulty, upon the supposition that the Ecclesiastical Court had adopted a positive rule from the Civil Law upon legatory questions, and the inconvenience of preceding by a different rule in the concurrent jurisdiction (it is not right to call it so), in the resort to this Court instead of the Ecclesiastical Court upon legatory questions, which, after the Restoration, was very frequent, in the beginning embarrassed the Court. Distinction upon distinction was taken to get out of the supposed difficulty." His Lordship then proceeds, in no measured terms, to condemn the folly of importing the rules of the Civil Law into the Ecclesiastical Courts,* and ended by observing, "the authorities stand so well ranged that the Court would not appear to act too boldly whichever side of the proposition they should adopt."

With regard to the rival merits or demerits of the Civil and the Common Law, we do not hold so decided an opinion as Lord Rosslyn. On the contrary, we have every desire to encourage the spirit of compromise. We do not, we confess, entertain such an exalted opinion of the excellence of the Canon Law or the Common Law as to regard the complete triumph of either system in the light of a highly desirable event. We think that either system might, with advantage, accept of modification from the other, but we are unable to adopt the rough and ready form of compromise instituted by the Judges as a satisfactory settlement of their relative claims. It would, we humbly conceive, have been preferable to amalgamate the two systems of Law instead of allowing each of them to exercise more or less undisputed sway in its own allotted domain. Indeed, we venture to submit that almost anything would have been better than the present ludicrous anomaly of construing different passages in the same will according to antagonistic rules of construction. By whatever legal subtleties such a result may be defended, we are afraid that to the lay mind it will always appear strange that a condition in one part of a will should be interpreted to mean something quite different from an identically similar condition in another part. This result does not seem to have been brought about by reason of any overweening regard on the part of the Chancellors for the sanctity of every jot and title of the Canon Law; on the contrary, on the partial adoption of that Law they did not scruple to introduce amendments of their own, some of which we cannot conscientiously designate as imdesignate as improvements. For instance, the Canon Law recognised no distinction between conditions subsequent and precedent in restraint of marriage, and attached no importance to the circumstance of a bequest over, two very considerable variations from the doctrine of the Court of Chancery. Although, therefore, we are inclined to agree with Lord Rosslyn in thinking that the Chancellors felt themselves, in some degree, hampered and embarrassed by the concurrent jurisdiction in the matter of legacies assumed by the Ecclesiastical Courts; still, in the face of the wide differences which were permitted to continue, we suspect that the concessions made on their part were not such as they regarded with any great aversion. We are strongly of opinion that the different construction of conditions, according as they affect gifts of realty or personality, may be explained without having recourse to the supposition of undue clerical influence. A devisee stands on quite a different footing in the estimation of the Court of Chancery from a legatee. While legacies affect only the next-of-kin, devises are in-

* It is remarkable that his Lordship, while praising the Common Law and condemning the Canon Law, should have found fault with the distinction between condition precedent and subsequent, which is a creature of the Common Law.

jurious to the sacred interests of the heir-at-law. Now between a testator's legatees and his next-of-kin Equity is content to hold a pretty even balance, the claims of the next-of-kin not being invested with any peculiar sanctity, whilst the heir-at-law has always been pre-eminently what is called "a favourite" with the Court. Any interference with the prospects of that favoured individual, who has the divine right of primogeniture on his side, is jealously watched, and, indeed, the measure of favour dealt out to him was so extravagant, and so obviously inconsistent with a just estimate of the rival claims, both of creditors and of next-to-kin, that the Legislature had to interfere and enforce (in spite of strenuous opposition on the part of the highest legal functionaries) the elementary principles of justice; 1st. By making the heir liable to the extent of his inheritance for all the debts of his ancestor; and, 2ndly. By forbidding him to come upon the next-of-kin to pay off out of personalty the mortgages and charges to which his inheritance had been subjected. The heir-at-law then and the next of kin stand at the opposite ends of the scale of favouritism. Starting from this premise we may deduce the relative positions of legatee and devisee. In so far as their respective interests do not clash with those of the heir, the devisee is the more favoured of the two. He holds a very strong position when put in competition with such unconsidered persons as legatees and next-of-kin, but in so far as he ousts the heir he is considered in the light of a usurper, and the Court is only too glad of any excuse for holding a devise to be inoperative, and so reinstating their favourite the heir.

But whatever may have been the original motive for construing conditions attaches to devises more strictly than conditions attaches to legacies, whether partiality for the heir or regard for the Canon Law; at the present time there is not a shadow of excuse for making rules of construction vary according to the nature of the property given. If the doctrine of conditions *in terrorem* is held to furnish the rules of construction best calculated to carry a testator's real wishes into effect, the doctrine should manifestly be applied to devises as well as legacies.

It may be observed that even this last-mentioned limitation of the famous doctrine, comparativaly simple as it is, has given rise to questions of some difficulty. It has only just been decided, and we venture to doubt whether it has been finally settled, by the present Master of the Rolls (*Bellairs* v. *Bellairs*, L. R. 18 Eq. 510), that a mixed fund of realty and personalty follows the rule of personalty, and in the same case it was intimated, but not expressly decided, that proceeds of sale of realty follow the same rule.

We have said enough to give some idea of the absurd and perplexing nature of the law of conditions *in terrorem*. We must not forget that a complete knowledge of that branch of the law, so far as it has been settled is but a small part of the qualification necessary for deciding on the validity of conditions in restraint of marriage. We have but put aside all the judically collected rubbish which impedes us at the threshold of our inquiry. We have learnt only to decide under what circumstances a testator shall be presumed to have meant what he has said, and it remains to be seen how far the law will permit his intentions when discovered by the canons of construction already noticed, to be carried into effect.

It is not every condition in restraint of marriage that is illegal. If a condition is what Equity considers reasonable, it has some chance of being enforced. The delicate task of discriminating between reasonable and unreasonable conditions, has, of course, afforded abundant opportunity for the display of differences of opinion among the Judges. On the whole, however, we do not think that the conclusions arrived at are, as a rule, sufficiently remarkable either for their sagacity or the reverse, to be of any great value, whether by way of example or warning; we do not propose, therefore, to dwell at length on this division of our subject, but only to mention shortly some few decisions which seem especially open to comment.

In the first place, Equity shows no indulgence to second marriages under any circumstances whatever. Widow or widower, young or old, childless or otherwise, Equity sees no reason why any one should not be debarred from marrying again under any pain of pecuniary loss.

This result seems to have been arrived at by easy stages. It was very early decided that a testator might reasonably hold out a pecuniary inducement to his widow to remain faithful to his memory, whether she had any children by him or not, and there is some authority in the early cases for supposing that sons had the like power of throwing obstacles in the way of the second marriage of their mother. It was, however, reserved for Lord Hatherly, when Vice-Chancellor, and the Court of Appeal, in the Chancery Division, to advance the doctrine as to second marriage by two important stages. Lord Hatherley (*Newton* v. *Marsden*, 2 J. & H., 356, 31 L.J. Ch. 690) in a very long and elaborate judgment, decided on the balance of authority, that any one may impede the marriage of a widow to the same extent as her late husband, and it has quite recently been held by the Court of Appeal *Allen* v. *Jackson*, 1 Ch. Div., 399), reversing the decision of Vice-Chancellor Hall, that the second marriage of a widower is not more favoured than that of a widow. In the entire want of sympathy with second marriages evinced by the the Judges, they are not altogether in accord with the Civil Law, which only countenanced restraints on second marriage where the interests of the children of the former marriage might be affected. We confess that, in our opinion, the ancient law might have been followed with advantage. It seems a little hard that persons whose first marriage has not been attended with the natural result should be restrained from contracting a second, particularly, as a learned Judge pathetically observed, where the surviving party is still of an age to do good service to the State by the procreation of children. We are aware that there exists some diversity of opinion with regard to the precise degree of merit attaching to such a service, but without entering into that delicate inquiry, it is enough for us to suggest that most of the objections to the marriage of childless widows and widowers apply equally to first marriages.

The Court does not look with any disfavour upon conditions restraining marriage without consent where such conditions are deemed reasonable, and the judges have felt no difficulty in upholding the validity of conditions whether precedent or subsequent requiring the consent of trustees to the marriage of a legatee under age, indeed it has been held by the Lords Justices (*Younge* v. *Furse*, 8 D. M. & G., 756), that a testator may legally declare a forfeiture upon the marriage of his daughter (and we presume of any other woman), *with or without consent*, under the age of 28. This seems a strong decision, and under the circumstances, the testator having himself, shortly before he died, consented to the proposals of the young gentleman, subject only to his daughter's approval, it was particularly hard on the legatee. Even in the absence of any special element of hardship, we think a condition prohibiting the marriage of a woman under 28 can scarcely in fairness be called a reasonable condition. We can quite understand that to elderly gentlemen like the Lords Justices, who were perhaps at the age of 28, only in the first struggles of their professional career, that age should savour of extreme youth, but they should remember that girls are commonly placed in the way of receiving proposals of marriage at the age of 17 or 18, and that to prolong for ten years the inconveniences of an engagement when they might at once be put an end to by the nearest parson, much to the satisfaction of all parties, is indeed a serious responsibility.

But although a testator may prohibit his daughter, under pain of pecuniary penalties, from marrying under the age of 28 at his own absolute discretion without giving any reason whatever, it would appear from the case of *Morley* v. *Rennoldson*, 2 Hare, 579, that he might not altogether prohibit her from marrying even though he gives what most people would consider a good reason for the prohibition. In that case the testator purported to prohibit his daughter from marrying on the ground that she was suffering from nervous debility, which totally unfitted her for the control of herself, nevertheless the prohibition was held to be void. The evidence indeed went to show that the testator was mistaken in his estimate in his daughter's state of health, but the judgement of Vice-Chancellor Wigram goes the length of affirming that nothing short of an absolute incapacity to contract marriage, such as would in itself suffice to render the ceremony void, justifies a condition in general restraint of marriage. Our sympathy in this case is with the tes-

tator rather than his daughter, but in general the former has much the best of it. Not only is he permitted, and even encouraged, to hinder a woman from marrying any specified individual whom he may happen to dislike, but the law actually considers it reasonable that he should be empowered to impose a husband of his own choice as the price of enjoying his bounty. When not to marry A. B. is considered a punishable offence, we may conceive with what severity the crime of insisting upon marriage with C. D. is regarded by the judges. Lord Chancellor King (*Jarvis* v. *Duke*, 1 Vern. 19), waxed very eloquent on the "presumtuous disobedience" of such conduct, and observed that the delinquent highly merited her punishment "she being only prohibited to marry with one man by name and nothing in the whole fair Garden of Eden would serve her turn, but this forbidden fruit." The judges have experienced great difficulty in dealing with those cases where a testator has made his bounty dependent on marriage with consent, without limiting any time after which the legatee may marry without consent. Here the most refined distinctions have been taken, and the authorities are in a chaotic state of confusion. It is not only that all the before-mentioned inquiries may have to be made, 1st as to the nature of the property in dispute, whether realty, personalty, proceeds of sale of realty, or a mixed fund, 2ndly as to the nature of the condition whether precedent or subsequent, 3rdly as to whether there is a gift over, or 4thly an alternative gift—on every one of which points very difficult questions may arise—it is not only that a definite answer has, if possible, to be obtained to some, or perhaps, all of these perplexing inquiries, but that when the required results have with infinite labour been worked out, it often happens that the law applicable to them is involved in so much doubt, and the authorities are so confused and contradictory as to justify the Court in pronouncing a decree for either party it pleases.

The cases on gifts of land, and legacies charged on land, are particularly unsatisfactory and hard to reconcile. We have seen that in the construction of such gifts the doctrine of *in terrorem* does not apply. This seems to be the only distinction established beyond all dispute. We seek in vain to discover from the authorities how far, or in what respects, the Law as to conditions in restraint of marriage annexed to gifts of realty differs from the Law relating to legacies out of personality where there is a gift over, so as to eliminte the *in terrorem* factor of the problem, or even whether there is any difference at all. It has often been said that conditions precedent annexed to devises must be scrupulously complied with in order to raise the estate, either leaving it to be inferred, or sometimes expressly stating* that conditional bequests of personality stand on a different footing; we are, however, unable to gather from the cases, taken collectively, in what the difference, if there be any, consists, and we doubt very much whether a condition precedent in restraint of marriage could be framed so as to be valid if annexed to reality, and void, notwithstanding a gift over, if annexed to personality. In whatever way the Law may be finally settled, as regards conditions precedent, up to a very recent time we considered there could be no reasonable doubt as to one feature, at least of the Law applicable to condition subsequent. We used to be clearly of opinion that if any proposition of Law or Equity could be considered to be established beyond all controversy, it was the proposition that conditions subsequent in general restraint of marriage are altogether void, whether annexed to devises of realty or to bequests of personalty. What then was our astonishment when we found that six very learned counsel had recently succeeded in convincing (*Bellairs* v. *Bellairs*, L. R. 18 Eq., 510), no less eminent a Judge than the the present Master of the Rolls that a condition in general restraint of marriage, whether precedent or subsequent, annexed to a devise of realty, is perfectly good. It was unnecessary to decide the question as the ingenious six (who certainly deserved a better fate) were held to be out of Court on another point, but it is somewhat strange, at this time of day, to find six counsel capable of asserting, and an unusually able Judge capable of taking for granted, as he did in the most explicit and positive manner, the non-existence of what is, we venture to think, the most elementary and funda-

*As in the case of *Reynish* v. *Martin*, 3 Atk.,320, but see *Webb* v. *Grace*, 2 Ph., 701.

mental of all the propositions connected with the subject under discussion. Fortunately, we are relieved by a still more recent case before the Lords Justices (*Allen* v. *Jackson*, 1 Ch. D., 399), from the necessity of considering whether the dictum of the Master of the Rolls may not, after all be well founded. But while we agree that he was not justified in the truly startling conclusion he arrived at, the mere fact that so distinguished a Judge could be led into so grave and fundamental an error, sufficiently shows the unsatisfactory state of the authorities.

It will, we hope, be understood that in passing judgment on the inconsistent and unintelligible mass of authority which, at present, encumbers the question of the validity of conditions in restraint of marriage, we are far from ignoring the extreme difficulty of dealing satisfactorily with so delicate and complex a subject. While we believe that scarcely anything could be worse than the present state of the Law, we willingly admit that the Judges, in undertaking a crusade on behalf of matrimony, embarked upon an enterprise partaking of the nature of a forlorn hope. It is true that by multiplying distinction upon distinction they added obstacles of their own creation to those which were already sufficiently formidable; but we must not forget the serious character of the impediments which unavoidably obscured the prospect of success. We do not say that the Judges acted wrongly in endeavouring to protect the interests of matrimony against the machinations of crochety testators; we are by no means convinced that if, by the instrumentality of any moderately intelligible code, a testator could be deprived of the power of creating a forfeiture on the marriage, however eligible, of a legatee, such a consummation would not be desirable; nay, further, if the present Law, with all its defects and absurdities, were successful in securing the object it professes to have in view, if it did, in fact render it impossible or even difficult to frame a valid condition in general restraint of marriage, we allow there would be some tangible result to set in the balance against the profuse expenditure in litigation occasioned by contradictory decisions and the growth of unreal distinctions, a result that we conceive might be considered by some persons, other than lawyers, as worth, say, a small fraction of the amount netted in costs by the legal profession. But even this set off cannot be claimed. It is not impossible, it is not even difficult to frame a condition in general restraint of marriage, in such a way as to hold good against the whole Bench of Judges. On the contrary, it is well-known to every country solicitor that nothing is easier than to frame such a condition, and perhaps there is scarcely a country solicitor in good practice who has not framed many of them. The process is delightfully simple,—no elaborate fictions are required, no intricate formalities have to be complied with, such as used to be considered necessary, to throw a decent veil over the proceedings in fines and recoveries,—all that has to be done is, instead of declaring a forfeiture on marriage, to declare that the devisee or legatee shall only enjoy the testator's bounty *until marriage*, in other words, to turn what is technically known as a *condition*, into what is technically known as a *limitation*. It requires no argument to show that the distinction between a condition and a limitation is just as unreal, with reference to the question under discussion, as the distinction between conditions subsequent and precedent. Every condition of forfeiture necessarily implies a limitation until forfeiture, and it is obviously a mere chance whether a testator, without a lawyer at his elbow, expresses himself in the one form or the other; or as in the case of *Webb* v. *Grace*, 2 Ph. 701, in some intermediate form, of which the interpretation is as much a chance as was the original choice of words. The distinctions taken on this head are of course extremely fine. The tendency of the recent decisions has been in favour of construing everything as a limitation. Where, instead of an absolute forfeiture, there is an alternative bequest on marriage, it seems, notwithstanding a very explicit gift for life in the first instance, that effect will be given to the clause of partial forfeiture, by way of limitation.* Indeed, in the recent case of *Allen* v. *Jackson*, already referred to on another point, the Lords Justices express-

* But see contra *Bellairs* v. *Bellairs*, L.R. 18 Eq. 510 noticed above.

ed much doubt as to whether an express limitation during life was not, under the circumstances, cut down by a subsequent clause of *absolute* forfeiture on marriage, so as only to take effect as a limitation until marriage. If the doubt entertained by the Lords Justices be well founded, we submit that the law relating to conditions in restraint of marriage would die a natural death for want of a subject upon which to operate, for if the words in *Allen* v. *Jackson*, did not constitute a condition, it is difficult to see how there can be any such thing at all as a condition as distinguished from a limitation. The Lords Justices endeavoured to persuade themselves that the distinction between conditions and limitations was a distinction capable of being decided with reference to the intention of the testator. We would gladly think it were possible to accept this view. It is, however, clearly untenable, the distinction is and must always remain a mere question of phraseology.

(To be continued.)

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

COURT OF APPEAL.

Samo v. Gore District Mutual Fire Insurance Company.

From C. P.] [June 27.

Insurance—Misstatement as to title and incumbrances —Divisibility.

The plaintiff employed one R., an insurance broker, in no way connected with the defendants, to effect an insurance on their building and stock, informing him of there being incumbrances to a large amount on the building; and they signed a form of application in blank and handed it to R., who filled in the application, except as to incumbrances, which he left in blank. R. then applied to one, G., who also acted as a broker, and was in no way connected with the defendants; and G. submitted the application to defendant's local agent, who accepted the risk and received the premium. The agent then forwarded the application to the head office for approval, who returned it to him for information as to incumbrances. The agent then applied to G., who referred to R. R. having tried but failed to find the plaintiff stated to G. that there were none, and G. then tore up the application and filled in another one, stating that there were no incumbrances, and signed the plaintiffs' name to it; this he handed to the agent, and on it the policy issued. It was also proved that after the issuing of the policy, the plaintiffs effected a further incumbrance on the land, but did not notify the defendants. The plaintiffs having sued the defendants on the policy, which provided that if the assured was not the sole and unconditional owner of the property insured, and unless the true title was expressed therein, the policy should be void.

Held (Burton, Patterson and Moss, J. J. A.,) Harrison, C. J., dissenting, reversing the judgment of the Common Pleas, that the policy was divisible as to the real and personal property, and that the plaintiffs could recover on the latter, although the policy was void as to the former.

D. B. Read, Q. C., for the appellants.
Jas. Bethune, Q. C., for the respondents.

Appeal allowed.

McHardy v. Township of Ellice & Downie.

From Q. B.] [June 27.

Road between Townships—Bridge—Duty to repair—Municipal Act of 1873, Sections 410 and 416.

A stream called Black Creek, of from 30 to 40 feet in width, with clearly defined banks, crosses the roads running between the townships of Alice and Downie and is crossed by a bridge on that road. The plaintiff sued the two townships for injury sustained in consequence of this bridge being out of repair.

Sec. 413 of the Municipal Act enacts that it shall be the duty of county councils to maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county; and sec. 416 provides that in case one road lies wholly or partly between adjoining townships, &c., the council of the municipalities between which it lies shall have joint jurisdiction over the same, and the said road shall include a bridge forming part of the road. The Court (Hagarty C. J. C. P., Burton, Patterson,

and Moss, J. J. A.), allowing the appeal held that the Black Creek was a river within the meaning of sec. 413, and therefore that the county council were liable.

R. Smith, for the appellants.

C. S. Jones, for the respondent.

Appeal allowed.

BALL v. PARKER.

From Q. B.] [June 27.

Stat. of Limitations—Payment.

The plaintiff, an attorney, had an account for costs against defendant, a merchant, for services rendered before 1870, and which was therefore barred by statute. It appeared that in 1872 the plaintiff ordered goods of the defendant, without any agreement at the time as to how they were to be paid for, but after defendant had rendered his account for them the plaintiff told him or his clerk that he had credited it against his, the plaintiff's account, and no subsequent demand was made upon him for payment. In 1875 the plaintiff wrote the defendant sending his account and asking for payment, and stating that he had credited defendant's account rendered.

The defendant's clerk answered repudiating the claim, and added "Trusting you may be able to make your account out of the parties against whom you got judgment in the case as well as the advances made by me in cash and supplies charged to you since in my books," &c.

Held (Moss J. A., Galt J., and Proudfoot V. C., Burton J. A. dissenting), that there was no evidence of any payment on account to take the case out of the statute.

Jas. Bethune, Q.C., for appellant.

M. C. Cameron, Q.C., for respondent.

Appeal dismissed.

GRIEVE v. WOODRUFF.

From Chancery.] [June 27.

Dower—Costs.

The plaintiff filed a bill to establish her claim to dower. The defendant by his answer admitted the plaintiff was entitled to dower, but he submitted that her proper remedy was at Common Law, under the Dower Act of Ontario, and claimed the same benefit as if he had demurred.

Held, (Burton, Patterson, Moss J. J. A., and Proudfoot V. C.,) that the defendant must pay the plaintiff's costs.

W. Mulock, for the appellant.

Attorney-General and *J. S. Ewart*, for the respondent.

Appeal dismissed.

WALKER v. WALTON.

From Chancery.] [June 27.

Mechanics' Lien Act, 1874, sec. 14.

Held, (Burton, Patterson, and Moss J. J. A., Proudfoot V. C., dissenting) that sec. 14 of the "Mechanics' Lien Act, 1874," does not apply to claims existing or accruing under sec. 4 of the Mechanics' Lien Act, 1873."

H. McDonald, for the appellant.

A. F. Campbell, for the respondent.

Appeal allowed.

WRIGHT v. MORGAN.

From Chancery.] [June 27.

Mortgage- Stat. of Limitations—Disputing note.

Held, (Burton, Patterson, Moss J. J. A., and Blake V. C.), that it is unnecessary for a defendant to plead the Statute of Limitations in order to prevent the plaintiff from recovering interest for a longer period than six years; merely filing the usual disputing note is sufficient for the purpose.

H. J. Scott, for appellant.

W. Mulock, for respondent.

Appeal allowed.

ST. MICHAEL'S COLLEGE v. MERRICK.

From Chancery.] [June 27.

A. J. Act 1873, sec. 3.—Pleading equitable defence at law.—Equitable garnishment.

J. D. M. and A. M. were partners for the purpose of executing a contract. J. D. M. induced A. M. to admit S.M. his wife in his stead as a partner. A. M. then purchased J. D. M.'s interest and agreed to pay S. M. $10,000 therefor, which sum was not due at the time of the commencement of this suit. The plaintiff had obtained a verdict at law against J. D. M. and a rule was pending before the full court. The bill in this suit was filed on behalf of all the creditors of J. D. M. to impeach the arrangement whereby S.M. was substituted for J.D.M. It alleged that he was insolvent, and that it had been done for the purpose of defeating them in the recovery of their debt and prayed for an injunction to restrain A. M. from paying the $10,000 to either of the defendants, and further asked that the money might be applied to their debt.

Held, (Hagarty C. J. C. P., Burton, Patterson & Moss, J. J. A.) that the interest in the contract was not such an interest as could be attached by creditors.

Held, also, that the A. J. Act 1873, sec. 3, is permissive, and that a defendant may plead his equitable defence at law, or take proceedings in equity, but the equitable defence must be before judgment, as a judgment cannot be impeached in equity on equitable grounds if a defendant does not choose to raise his equitable defence in time.

Held, also, that after judgment at law, a plaintiff may proceed for the realization of it, either at law, or in equity, as the subject of a bill filed for that purpose would not be the same subject matter as that of the action at law establishing the right.

Fitzgerald, Q.C., and *Donovan*, for the appellants.

Attorney-General, and *Meek* for the respondents.

Appeal dismissed.

CHANCERY.

Wyoming v. Bell.

V. C. P.] [June 27.

Dedication—36 Vict. cap. 22. (O.)—Improvements.

A reservation for school purposes is of such a character as to be the subject of dedication.

The owners of land in 1856 caused the same to be surveyed and laid off into Village lots, and on the plan thereof, which was duly registered, marked a portion as "Reserve for School Ground." An auction sale of lots took place during the same month with reference to the lots not fronting on the reserve, when lots to the value of $20,000 were sold, and after the auction, lots were sold privately according to the plan. The school trustees did not take possession of the School reserve. Subsequently conveyances were executed to S. of all the unsold portions of the town as surveyed. S. in January 1863 caused a new plan to be prepared and registered in which the School reserve was laid out into Village lots, some of which had meanwhile been bought by the defendant from an intermediate owner with notice of the original plan and the reservation for school purposes:

Held, on a bill filed in 1876, that the original plan was binding; that the conveyance to S. did not give him the ownership of the soil of the streets or reserves for public purposes, and that the defendant was not entitled under the statute, 36 Vict. cap. 22 (O.) to be paid for any improvements he had made upon the lots forming part of the school reserve.

Craig v. Craig.

V. C. P.] [June 27

Easement—Injunction—Private way.

An agreement for an easement is presumed *prima facie* to be for an easement in perpetuity.

A legal title to a private right of way, can be obtained only by prescription, or by user for the time required by statute to give a title to easement, or by grant; but equity entertains jurisdiction to enforce agreements for easements as it would for the purchase of the fee.

The owners of two adjoining half lots entered into a general agreement, not limited in terms, for the construction of a lane between their respective properties and each gave about a rod for the formation thereof. The respective proprietors occupied the lands, using the lane in common for about 15 years, and until after the death of one of the original owners who had cultivated his farm and planted an orchard with reference to the lane.

Held, that the agreement must be presumed to have been for a lane in perpetuity, and was to be enforced accordingly.

Roe v. Braden.

Chancellor.] [June 27.

Registered Title.—Notice.—Possession.

In the case of a registered title, actual notice of the title of an adverse claimant is required to affect the grantee holding under a registered instrument. The mere fact that such adverse claimant is in actual possession of the land is not sufficient notice; nor will it be actual notice if the grantee is aware of the fact that a person other than his grantor is in possession.

Colonial Trust Co. v. Cameron.

V. C. P.] [June 27.

Trustee—Solicitor.—Costs.

The rule that a trustee, acting as a solicitor of the trust, is entitled to costs out of pocket merely, applies only when the costs are payable out of the trust funds, not when payable by an adverse party. *Meighen* v. *Buell*, 24 Gr. referred to and distinguished.

Re Robertson.

V. C. P.] [June 27.

Practice—Costs—Experts.

The general orders 240, 482 and 541 do not authorize the Master in proceedings before him to employ the services of experts; but where in an administration suit, instituted by the infant children of the deceased, whose estate, as appeared at an early stage of the proceedings, was insufficient to pay the creditors, the Master had, at the instance of the plaintiffs and with the consent of the creditors, employed an expert whose services had been of benefit to the estate, by having a large claim against it disallowed. The Court *held*, on appeal, that the creditors could not afterwards on the taxation of costs object to the allowance of the sums paid to such experts.

When in such a suit the plaintiffs had incurred the expense of several journeys to examine the books of the estate, *held*, that as these journeys had been made and the expense incurred without the consent of the creditors—the only persons really interested in realizing the estate—the charge could not be allowed to the plaintiffs on taxation.

Although by the tariff of costs the attendance before the Master may be increased to $2 an hour by the local Masters on taxations, still order 312, giving the taxing officer at Toronto power to revise the taxation, empowers him to reduce such allowance.

The Master disallowed the whole of the charges for the service of warrants on creditors, and, as the proceedings had not been sanctioned by the creditors, the Court, on appeal, sustained this ruling. Although had the proceedings been approved of by the creditors, it would have been reasonable to have allowed so much of the charge as would have been incurred in serving the creditors with notice of the proceedings, notice being all that is required to be served on creditors whose claims are disputed.

The same rule was adopted in respect of a fee paid to a counsel in the United States, notwithstanding that his services had been beneficial to the estate.

The Master had disallowed the solicitor of the plaintiff's charge for comparing the deeds of property sold to purchasers under the decree. On appeal the Court over-ruled the Master's finding, it being the duty of the vendor's solicitor to see that the engrossed deed agrees with the draft.

Where the Master had exercised his discretion in making an allowance to a solicitor for his services in respect of encumbrances, the Court refused to disturb his ruling. Instalments of purchase (not deposits on sale) were paid by the purchasers to the solicitor of the plaintiffs, and by him paid into Court. *Held*, that he was not entitled to any remuneration from the estate for such service, it being the duty of the purchasers to pay these moneys into Court.

A sum of money paid to the local Master for going out of the Province to take evidence was disallowed, as it was not shown that the creditors had desired or consented to the proceeding.

Certain disbursements, for the proving of which an affidavit had been made, were disallowed on taxation: *held*, that the charge for preparing the affidavit was also properly disallowed.

ARMSTRONG V. GAGE.

V. C. P.] [Sept. 5.

Duress—Execution of Mortgage to avoid arrest.

The plaintiff, a farmer of about 60 years of age, who was in the habit of selling wheat and other grain to the defendant Bierly, filed a bill to set aside a mortgage executed by the plaintiff in favour of the defendant Gage for $600 under the following circumstances: The plaintiff having brought a load of wheat to Hamilton, to sell, and having procured a ticket in the usual manner, evidencing its weight, sold it to Bierly, in whose integrity plaintiff stated he had the fullest confidence, and left the ticket with his clerk, who afterwards objected that the amount of wheat mentioned in the ticket was much larger than that actually delivered by plaintiff, and who, it was alleged, had changed the figures "12.40," into "42.40," thus evidencing forty-two bushels and forty pounds, instead of twelve bushels and forty pounds; that Bierly had plaintiff taken to the office of Waddell, a solicitor in Hamilton, and there, while a detective was stated to be and was in fact in an adjoining room, a computation was professed to have been made of several other quantities of wheat which it was asserted the plaintiff had cheated Bierly out of by altering other tickets, making up in all a sum of $504.37, which it was stated plaintiff had thus obtained from Bierly by forgery; and plaintiff was then told that unless he executed a mortgage on his farm for $600, he would forthwith be arrested and committed to gaol; that plaintiff had requested permission to communicate with some solicitor, but defendants refused to permit him to do so, and threatened that if he left the office he would be arrested immediately. That the plaintiff, being utterly prostrated by these charges and being ignorant what legal responsibility he might inadvertently have incurred and dreading the consequences of such a charge, though unfounded, being made against him, he was in such a state of mind as to be wholly unable to udge clearly or deliberately of his position, and at length, after being kept in Waddell's office for at least four hours—although he was, meanwhile, offered permission to go and see a solicitor by Waddell, who refused, however, to insure him from arrest—the plaintiff was induced to execute the mortgage as he alleged by coercion and duress, for $600, although plaintiff alleged that the whole amount of grain ever sold by him to Bierly would not exceed $250.

The defendants denied the charges of fraud, conspiracy, duress and coercion made against them, and at the hearing of the case in June, 1874, a decree was made by consent, referring

it to the Master at St. Catharines to "inquire and state what, if anything, was due to Bierly in respect of the grain transactions in the pleadings mentioned on the 15th November, 1873," reserving further directions. The reference was afterwards changed to the Master at Hamilton, who on 8th of July, 1876, made his report, whereby he found that there was due to Bierly in respect to the said transactions—exclusive of the twelve bushels and forty pounds of wheat—the sum of $450.15 principal and $3.16 interest. From this report the plaintiff appealed on the ground that the Master should not have found anything due to Bierly on the wheat transactions, and the appeal came on to be argued before

Proudfoot, V.C., who held, that the plaintiff was not under the circumstances precluded from disputing, notwithstanding the consent decree that had been made, the validity of the mortgage, and that the evidence sufficiently shewed that the mortgage had been executed by the plaintiff under duress and coercion; and that the evidence when properly weighed, negatived the claim of Bierly. He allowed the appeal with costs.

Buchanan v. Brooke.

V. C. P.] [Sept. 5.

Equitable execution.

This was a suit for equitable execution. It appeared that the defendant being liable to the plaintiff, as endorser, his father had devised the income of his estate to the defendant and his wife, for the support of themselves and family, and after their decease the corpus was to be divided among their children. There was no devise over of the estate in case of process issuing at the instance of his creditors. Under these circumstances, the Court directed a reference to the Master to inquire what would be a sufficient sum for the proper support of the defendant and his family: the excess over and above that amount to be applicable to the payment of the plaintiff's claim.

The Grand Junction Railway v. The Corporation of Hastings.

V. C. P.] [Sept. 5.

Invalid assignment of Corporation assets.

This suit was instituted to set aside a transfer of $50,000 of stock, held by the defendants, the County, in the company of the plaintiffs, to the defendant McIntosh, alleged by the plaintiffs to have been so made to him fraudulently on the 2nd October, 1873, in order to avoid payment of future calls; and charging that McIntosh was a person of no means, and unable to pay calls. The cause came to be heard before Vice Chancellor Proudfoot at the last Spring sittings at Belleville, when the learned Judge determined that if the transfer were real it would not be void, even though the object of such transfer were to get rid of the liability to pay calls; that the result of the evidence was to establish that it was intended to be an absolute transfer, unfettered with anything in favor or for the benefit of the County—reserving simply the question whether or not the transfer had been effectually made.

It appeared that no question had ever been raised as to the *bona fides* of the original subscription, and that the County acted on it for several years, and paid calls to the extent of $15,000; that on the 1st October, 1873, while the stock stood in the name of the County, the Council, being then in session, authorized the Warden to appoint a committee of six to act with him in the Grand Junction Road matter; that the Warden accordingly appointed the committee, which reported next day, recommending that the Warden should be instructed to pay the then present call on the said stock; and that he should be authorized at any time thereafter, without calling the Council together, to manage the stock as he thought best in the interests of the Council, with full power to sell or otherwise dispose of the same as he should think fit. This report was adopted by the Council, and on the same day the Warden sold the stock to defendant McIntosh for $1.00, and duly executed a transfer thereof to him under the seal of the County.

Under these circumstances, the Vice Chancellor held the transfer invalid, as not having been duly authorized, and ordered the defendants to pay subsequent calls and the costs of suit; the Vice Chancellor observing that "to give legal authority for the alienation of the property of a municipal council, I apprehend a by-law under the seal of the corporation is necessary. The Municipal Act passed in March, 1873—36 Vict. ch. 48 (O.)—and which in this respect but repeats previous enactments, enacts (S. 372) that the council of every county may pass by-laws for obtaining such real and personal property as may be necessary for the use of the corporation, and for disposing of such property when no longer required. . . . A resolution seems in some cases to have amounted to an agreement which equity would enforce, but that was where money had been expended on the faith of it: Grant on Corp. 57. But the general rule, I conceive, is to be found in the statute which treats a by-law as necessary."

UNITED STATES REPORTS.

SUPREME COURT OF THE UNITED STATES.

Southern Express Company v. Dixon.

Delivery to consignee of goods at place other than destination.

T., one of the firm of T. & R., delivered to an express company at Greensboro, N. C., goods consigned to the firm of T. & R. at Columbia, S. C., at the time informing the company that the goods were the property of D. Subsequently, without the consent of D., the express company delivered the goods at Greensboro upon the order of T. *Held*, that the company were liable to D. for the value of the goods.

[15 Albany L. J. 491.

In error to the Circuit Court of the United States for the Southern District of Alabama. The facts appear in the opinion.

Mr. Justice Hunt delivered the opinion of the court.

The case in brief is this: The agent of the plaintiff Dickson, delivered to the express company at Greensboro, North Carolina, fifty-twe boxes of tobacco to be shipped to Columbia, South Carolina. The boxes were consigned to Trent & Rea at that place, and the delivery to the company for shipment was made by Trent, one of the said firm, who at the time informed the company that the tobacco was the property of the plaintiff. A written receipt was given by the company in the usual form. The boxes never left Greensboro, but were sold by Trent to one Mendenhall, without authority of the owner, and by the order of Trent were delivered to him by the company at Greensboro.

The court charged the jury that, if they believed from the evidence that the tobacco was, at the time of its delivery to the defendant, the property of the plaintiff, and that was known to the defendant or its agent, though by the receipt given for it Trent & Rea were the consignees thereof, and the defendant might lawfully deliver the said tobacco to the consignees at Columbia, South Carolina, the defendant was not authorized to deliver the same to the consignees, or either of them, or to any other person by the order of either of them, at Greensboro, North Carolina, the place of shipment, and such delivery at Greensboro, North Carolina, without the knowledge or consent of the plaintiff, would not discharge the defendant from liability therefor to the plaintiff. To which charge of the court the defendant then and there excepted.

By various requests to charge the defendant presented the point in different forms, but the question of law is clearly indicated by the charge given and the exception thereto. If the express company was justified in delivering the property at the place of its intended shipment upon the order of Trent, it is not liable in this action. If not so justified, but if it was bound to transport and deliver as agreed in its receipt, or to deliver it to the owner, then it is liable, and the judgment should be affirmed.

We are not called upon to question the proposition that a consignee of goods is for many purposes deemed to be the owner of them, and may maintain an action for their non-delivery. 1 Par. Ship. 269. In the case before us the proof was given, and the jury found that the goods did not belong to the consignees, but were the property of the shipper, and that this was known to the carrier. The question is, rather, where it is known that the goods are the property of the shipper, and have been shipped by him for delivery to the consignees as his agents at a distant place, can the carrier deliver the goods to such consignees or to their order at another place, or without starting them on their journey? We think the rule is that where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only, for his interest, upon such terms as he dictates in regard to the delivery, and that the consignees are to be regarded simply as agents selected by him to receive the goods at a place indicated. Where he is an agent merely, the rule is different. This is illustrated by the case of *Thompson* v. *Fargo*, 49 N. Y. 185. Thompson had, as the agent of White, collected certain moneys belonging to White, and inclosing them in a package directed to White at Terre Haute, Indiana, sent the package from Decatur, in the same State, by the express company. Various attempts were made to deliver the package to White, but he could not be found, and Thompson, the shipper, at length demanded the return to him of the package, and on refusal brought an action to recover its value. The Court of Appeals of New York held that the action could not be maintained, saying that if the case had been one of a sale by the consignor with no directions from the consignee how to ship the goods, an action might have been sustained by him, as the title would remain in him, but when the consignor was the mere agent, having no interest in the property, but acting in pursuance of the orders of the owner, in shipping the property, he could not maintain an action; that a delivery to him would be no defense to an action by the owner. The case of *Duff* v. *Budd*, 3 Brod. & B. 177, holds the same rule.

The numerous cases cited by the plaintiff in error, to the effect that any delivery to the consignee, which is good as between him and the carrier, is good against the consignor, are cases

where the carrier has no notice of the ownership of the property other than that implied from the relation of the parties to each other as consignor and consignee. This gives to the consignee the implied ownership of the property, and hence justifies the carrier in taking his direction as to the manner of delivery. In addition to those authorities, reference may be had to *Sweet* v. *Barney*, 23 N. Y., 325, where a bank in the interior of New York sent by express a package of money directed to "The People's Bank, 173 Canal street, New York." The package was delivered to an agent of the People's Bank at the office of the express company, and was stolen from such agent. The bank in the interior brought its action against the express company, and the question was whether the express company was authorized to deliver the package at any other place than 173 Canal street. The court held that as there was no notice to the express company that the money was not the property of the People's Bank, in the city of New York, nor any circumstances to weaken the presumption that the money belonged to that bank, any delivery that was good as to that bank discharged the carrier.

Of the character mentioned is the case of *L. & N. W. R. W. Co.* v. *Bartlett*, 7 H. & N. 400, which is much relied on by the plaintiff in error. The consignee in that case was the purchaser of the wheat in question, and consequently any delivery to him, or his order, wherever it might be, would be a discharge to the carrier.

The same fact existed in *Mitchell* v. *Ede* and *others*, 11 Ad. & Ellis, 888. The plaintiff recovered the value of the sugars shipped from Jamaica, for the reason that under the circumstances stated he was held to be the owner of them. Upon the same principle is *Foster* v. *Frampton*, 6 B. & Cr. 107, where the goods were received from the carrier by the actual vendee, and it was held that the *transitus* was at an end.

We do not perceive any thing adverse to the principles we have stated in the learned opinion delivered by Ch. J. Shaw in *Blanchard* v. *Paige*, 8 Gray, 285, nor in *Lee* v. *Kimball*, 45 Me. 172, which holds that where a vendee of goods sells the same before reaching their destination, the right of stoppage *in transitu* is ended.

We base our judgment upon the bill of lading and its legal results, adopting the fifth point of the plaintiff in error, that any antecedent agreement or understanding was merged therein and extinguished thereby. The circumstances of the shipment, how and by whom made, and the knowledge of the ownership, were proved without objection. These circumstances, and the bill of lading adopted and claimed by the plaintiff, and the point raised by the exception to the charge of the judge, present the question we have discussed and no other.

The plaintiff in error now contends in his eleventh point that Dickson was not the owner of the tobacco. This point cannot be raised here. No request or exception was made which involves the question. The ownership was assumed throughout the trial, in the charge of the judge, not disputed in the requests to charge, and if a subject of doubt in any form, must be considered as settled by the verdict. The only suggestion of a denial of ownership is in the request to charge that if the tobacco was in the possession of Trent, as agent of Dickson, or otherwise, then the delivery to him or his order was lawful. To hold this to be a denial of the ownership of Dickson, or a claim of ownership by Trent, would go far beyond any reasonable construction. We see no error in the rulings at the trial, and are of the opinion that the judgment should be affirmed.

SUPREME COURT OF RHODE ISLAND.

Heeney v. Sprague.

When injuries resulting from violation of municipa ordinance do not give right of action.

The violation of a duty imposed by a municipal ordinance, and sanctioned by a fine, will not support an action on the case for special damages in favor of one injured by the violation and against the violator.

[15 Albany L. J. 512.

Motion in arrest of judgment. The action was brought by William Heeney and wife against Mary Sprague for injuries received by Mrs. Heeney in falling upon a slippery sidewalk in front of defendant's premises. The sidewalk had become slippery from a neglect on the part of defendant to remove the snow therefrom. A city ordinance of the city of Providence in which such premises were situated, required the removal of snow from the sidewalk in front of any premises in the city and prescribed a penalty for a failure to comply with the ordinance. The jury at the trial rendered a verdict in favor of plaintiff for $2,750.

Durfee, C. J. The plaintiffs base their right to maintain this action on the authority of cases which, they claim, hold that where a person is required by statute to do an act and neglects to do it, any person specially injured by the neglect is entitled to recover his damages in an action on the case, if no other remedy is given, and that, too, even when the statute imposes a penalty for its violation: *Couch* v. *Steel*, 3 El. &

B. 402, 411; *General Steam Navigation Co.* v. *Morrison*, 13 C. B. (N. S.) 581, 594; *Caswell* v. *Worth*, 5 El. & B. 849; *Atkinson* v. *New Castle & Gateshead Water Works Co.*, L. R., 6 Exch. 404; *Aldrich* v. *Howard*, 7 R. I. 199. It has been doubted, however, whether the cases go so far as is claimed. This doubt is expressed in *Flynn* v. *Canton Co. of Baltimore*, 40 Md. 312, and in that case the attempt is made to confine the liability to cases in which the neglected duty is prescribed for the benefit of particular persons, or of a particular class of persons, or in consideration of some emolument or privilege conferred, or provision made for its performance, and to show that it does not extend to a duty imposed without consideration and for the benefit of the public at large, the only liability for the neglect of such a duty being the penalty prescribed. And this view is supported by strong, if not irrefragable authority: *Hickock* v. *Trustees of Plattsburg*, 16 N. Y., note on p. 161; *Eastman* v. *Meredith*, 36 N. H. 284; *Bigelow* v. *Inhabitants of Randolph*, 14 Gray, 541; *Aldrich* v. *Tripp*, Index C, 14. But even supposing the liability is not subject to any such qualification, then, inasmuch as the neglected duty was not enjoined by statute but by a municipal ordinance, the question arises whether in this respect an ordinance is as effectual as a statute. There are many things forbidden by ordinance which are nuisances or torts, and actionable as such at common law. The question does not relate to them. The defendant has not done anything injurious to others which she was forbidden to do; she has simply left undone something beneficial to others which she was required to do under a penalty in case of default. The thing required was not obligatory upon her at common law. It was a duty newly created by ordinance, which, but for the ordinance, she might have omitted with entire impunity. The question is, whether a person neglecting such a duty is subject not only to the penalty prescribed, but also to a civil action in favor of any person specially injured by the neglect. If the liability exists, it is quite a formidable one. A fall on the ice is often serious in its consequences. The damages resulting from it may amount to thousands of dollars. And under the ordinance, the liability, if it exists, may be visited upon either the owner or the occupant of the abutting premises, or upon any person having the care of them. And further, if the liability exists under the ordinance in question, it exists *pari ratione*, under every ordinance prescribing a similar duty. To hold that it exists is therefore to recognize, outside the legislature, a legislative power as between individuals which, though indirectly exercised, is nevertheless in a high degree delicate and important. This we ought not to do, unless upon principle or precedent our duty to do it is clear; for we do not suppose that the creation of new civil liabilities between individuals was any part of the object for which the power to enact ordinances was granted.

In some of the cases the origin of the liability upon a statutory duty is ascribed to the statute of Westminster 2, cap. 50; 2 Inst. 485–6. See *Couch* v. *Steel*, 3 El. & B. 402, 411; *Aldrich* v. *Howard*, 7 R. I. 199, 214. That chapter, however, relates only to statutes; it does not extend to municipal ordinances. But even if the liability has its origin in the common law, we do not find that it has ever been held to extend to a neglect of duty enjoined simply by a municipal ordinance, and we think there are reasons, apparent from what we have already said, why it should not extend to it. The power to enact ordinances is granted for particular local purposes. It includes or is coupled with a power to prescribe limited punishments by fine, penalty, or imprisonment for disobedience. No power is given to annex any civil liability. The power, being delegated, should be strictly construed. It would seem, therefore, that the mere neglect of a duty prescribed in the exercise of such a power should not be held to create, as a legal consequence, a liability which, within the power, could not be directly imposed.

The plaintiffs, in support of the action, refer to *Jones* v. *Firemen's Fund Insurance Co.*, 2 Daly, 307, and *Bell* v. *Quinn*, 2 Sandf. 146. Neither of these cases is like the case at bar. The first was an action upon a policy of insurance containing a provision that the policy should be void whenever any article should be kept in greater quantities than the law allowed, or in a manner different from that prescribed by law, unless provided for in the policy. The plaintiff, who was insured, kept a kind of fireworks, called "colored lights," contrary to a city ordinance. The court decided that city ordinances within the city limits have all the force and effect of law, and that the plaintiff, therefore, could not recover. Here the only question was whether a city ordinance was a law in the sense in which the word was used in the policy. The court, in deciding that it was, expressed itself broadly; but its language, in so far as it covered more than the point decided, was *obiter dictum*. The case of *Bell* v. *Quinn*, 2 Sandf. 146, involved the effect not of a city ordinance but of a city charter. The action was upon a contract entered into in violation of the

charter, not for damages resulting from its non-observance. The court said: "We will not say what the consequence would be if the prohibition were found in an ordinance of the corporation instead of the statute law. 2 Sandf. 151." And see *Ex parte Dyster in the matter of Moline*, 1 Meriv. 155; also in 2 Rose, 349; *Kemble et al.* v. *Atkins et als.*, 1 Holt's N. P. 427 and note; 7 Taunt. 260. The defendant, on the other hand, has referred us to three cases: *Vandyke* v. *City of Cincinnati et al.*, 1 Disney, 532; *Kirby* v. *Boylston Market Asso.*, 14 Gray, 249; *Flynn* v. *Canton Co. of Baltimore*, 40 Md., 312. These cases are all in point, for they are exactly like the case at bar It was held in each of them that the only liability of the delinquent, under the ordinance, was to pay the penalty prescribed by it, and that the action could not be maintained. These decisions, in the absence of any case to the contrary, are entitled to our respect as authority, and for the reasons above indicated we agree with them. See *Brown, adm'r*, v. *Buffalo & State Line R. R. Co.*, 22 N. Y. 191; *Administrator of Chambers* v. *Ohio Life & Trust Co.*, 1 Disney, 327, 336.

The defendant's motion in arrest of judgment is sustained. *Judgment arrested.*

CORRESPONDENCE.

WHETHER DOWER ASSIGNABLE —WHETHER AVAILABLE TO CREDITORS.

To the Editor of the Law Journal:

I purpose now to examine the question whether the right to Dower is assignable; and how far it is available, if at all, for the benefit of creditors. And this part of the subject may be conveniently divided into a consideration of the properties and incidents of the right; 1st, when inchoate; and 2nd, when consummated by the death of the husband. The wife's interest is one, the consequences of the possession of which are rather incongruous. The complete enjoyment of the right depends not only upon her surviving her husband, but upon her avoidance of certain acts, the commission of which would bar or extinguish her right; such as adultery and elopement, or detinue of charters. Her interest can therefore hardly be said to be the subject of absolute property; since such, or the like, acts will not work a forfeiture of other interests in land. Depending, as it does, upon all these conditions, we can hardly expect to find traces of dealings with it as a distinct species of property; though our inability to discover them, even on account of their non-existence, will not alone justify the inference that it might not of itself have been the subject of bargain and property, had creditors or purchasers chosen to traffic for such a precarious right. But we find it made the subject of barter for a provision by jointure. This might have been done either before marriage or during the coverture; and in the latter case, though she was put to her election on the husband's death, still this arose from her disability to consent to the contract during coverture, and was not on account of the want of negotiability in the interest. This, as between husband and wife. Otherwise, it was usually regarded as a species of incumbrance upon, or an incident to, an estate, desirable to be got rid of and usually negotiated for upon a sale of the interest of the husband in the land. If her interest, being the possibility of succeeding to a portion of the estate, depending upon the chance of surviving her husband, be regarded as a mere possibility (though I shall endeavor to show hereafter that it has qualities which a mere possibility does not possess) it may be brought within the rules in Equity governing the assignment of possibilities. It would, on this assumption, appear to be analogous to the several species of property which form the subject of the class of cases represented by the following:—In *Warmsley* v. *Tanfield*, 1 Ch. Rep. 29, it was decided that a grant of a future possibility was not good in law, yet a possibility of a trust *in equity* might be assigned. And in *Hobson* v. *Trevor*, 2 P. Wms. 191, an agreement in marriage articles made in the lifetime of T., the grandfather of the wife, by her father, to con-

vey to the husband the one third part of what should come to the father of the wife on the death of T., his father, was decreed to be performed *in specie* after the death of T. intestate. In other words, the possibility of the heir's succeeding to his ancestor's estate was held to be the subject of assignment in the ancestor's life-time. See also *Wright* v *Wright*, 1 Ves. Sr. 411. In that case there was a devise of land to Robert or his heirs, to take effect on the happening of a contingent event. Robert, before the contingency happened, conveyed all his interest to his youngest son and his heirs, and then died. The contingency happening, it was held, that Robert's heir could not claim this against his father's deed. In other words, this possible interest, depending on the happening of an event, was held to be the subject of conveyance before the contingency happened. See also the cases cited in *Wright* v. *Wright*. In Story's Eq. Jur., 12th Edn. by Perry, 1040, it is laid down that "To make an assignment valid *at law* the thing which is the subject of it must have actual or potential existence, at the time of the grant or assignment. But Courts of *Equity* will support assignments * * of things which have no present actual or potential existence, but rest in mere possibility; not, indeed, as a present possible transfer operative *in præsenti*; for that can only be of a thing *in esse*; but as a present contract, to take effect and attach, as soon as the thing comes *in esse*." If the above analogy be well drawn, it would seem that the inchoate right might always have been assigned for value in Equity; though not at law until after the passage of the Acts hereafter referred to; yet, from its precarious nature, seldom if ever made the subject of barter. We find the view that it was a distinct species of property confirmed by the wording of the 37 Geo. III. cap. 17, (C. S. U. C., cap. 84, s. 5) which empowered any person without her husband's being party thereto, to bar her Dower by Deed containing a release thereof, executed as directed by the Statute; and shewing her untrammelled consent to the conveyance by a certificate in due form as thereby required; and such a conveyance was to have the same effect as a fine levied; which was the mode of barring her Dower previous to the Act. In other words, instead of resorting to the tedious process by fine she could now by an instrument executed as directed make a complete conveyance of her interest. "For, the expression that a woman may *bar her dower* in any lands, means no more than that she may convey, release, or part with, or do some act, which avoids her dower, or right to dower," per Wilson, J., in *Miller* v. *Wiley*, 16 C. P. 537. And the otherwise possible inference, from the use of the word "release" in the Act that there must be already an estate in the land in the releasee, upon which the release of dower might operate, is rebutted by the declaration in the Act that such a conveyance shall have the same effect as a fine would have had. See also 32 Vict. cap. 32, s. 31, O., where this right is also regarded as a distinct species of property. It would, therefore, seem that it was regarded by the Legislature as, or to use the words of Lord Chancellor Talbot (3 P. Wms. 234) "that here was the opinion of the whole parliament in the point" that it was a distinct species of property; a new method of dealing with which was supplied by this and the following Acts. The 50 Geo. III., cap. 10 (C. S. U. C., cap. 84, s. 6) extended the power of examination and granting certificates to other officials than those named in the former act. And the 3 Wm. IV. cap. 10, (C. S. U. C., cap. 84, s. 6) related to the form of certificate when the husband was parting with his interest and the wife joined to bar her Dower as incident thereto. The 2 Vict. cap. 6 was then passed, which by Secs. 3 and 4 enacted, that where a wife joined

with her husband in a conveyance containing a release of Dower, it should be a valid release without any examination or certificate. Though we find it said in *Miller* v. *Wiley*, 16 C. P., p. 542, "If she disposed of her right to Dower in the lifetime of her husband through whom she claimed it, she could only do so by a deed to be executed by her jointly with her husband," still we find the same learned judge who used these words, when speaking of the same question in *Miller* v. *Wiley*, 17 C. P. 372, (after referring at the beginning of his judgment expressly to the case in 16 C. P.) saying' "We express no positive opinion" on the question. The 37 Geo. III., cap. 7, manifestly gives her power to part with her interest without the joining of her husband, and that act was not repealed, but forms part of cap. 84, of C. S. U. C. Whatever argument in support of the view expressed in *Miller* v. *Wiley* might be founded upon the wording of the 2 Vict., cap. 6, is well answered by Robinson, C. J., in *Howard* v. *Wilson*, 9 U. C. R. 450· "I see nothing," says the learned Judge, "in any of the Acts, which makes a married woman less capable now of releasing her Dower by deed executed by herself alone, than she was by 37 Geo. III., cap. 10, which enables her to release her Dower by deed executed by herself, and makes her conveyance as effectual as if a fine had been levied." And, referring particularly to 2 Vict. cap. 6, the learned Chief Justice remarks that it was not restrictive, but enabling, in its provisions. "If before this Statute she could by a deed, executed by herself only, have released her Dower, provided an examination took place and a certificate were given in regard to her free consent, I cannot see that this clause would have disabled her from afterwards releasing in the same manner." And, indeed, its effect seems to be merely this, that where the husband joined, the examination and certificate were dispensed with. See also *Hill* v. *Greenwood*, 23 U. C. R. 404, where it was held that the 2 Vict. cap. 6, sec. 3, was not confined to deeds by which the husband conveys his interest in the lands; and *Bogart* v. *Patterson*, 14 Gr. 624. And in such a case also there must have been express words in the deed conveying or releasing the right. It would not pass as incident to the husband's estate merely from the wife's joining, though where the deed failed to take effect, by reason of the husband's having no interest to convey, or was void by reason of fraud, the dower would not pass even when express words were used in the deed. This arose from a want of intention to assign the interest as a distinct species of property or otherwise than as incident to the husbands estate. See *Miller* v. *Wiley*, 17 C. P. 308, where it was so held. But in this case, which was an action of dower, the tenants claimed adversely to the deed by which they contended that the demandant had parted with her right; and therefore they were precluded from saying that she was estopped by it. And the judgment expressly avoids the question now under examination; see also *Bank of U. C.* v. *Thomas*, 2 E. & A. 502. Still Mr. Justice Wilson's *dictum* only relates to the mode of conveyance. It does not disprove the proposition that the right is a distinct species of property and a negotiable one.

We now come to the consideration of C. S. U. C. cap. 90, by which (sec. 5) "a contingent, an executory and a future interest, and a possibility coupled with an interest in land" were made assignable. If this interest can be brought within the wording of this Act, no doubt can exist as to its being subject to execution. Some writers have thought that where the object of a contingent interest was not ascertained, the interest was a mere possibility; but became coupled with an interest when the *person* became fixed.

The wife's interest comes within the latter part of this description; since she is the ascertained object of a contingent interest. And taking this view of it, the interest would be within this Act. For though the event of the husband's death cannot be said to be a contingent one, yet the contingency lies in the uncertainty of its happening in the life-time of the wife. And it is said by Mr. Leith (R. P. Stat. p. 67) that the statute relates not to interests which are vested as regards estate and merely executory as regards enjoyment, but rather to those which are future and executory as regards not only their enjoyment but also their vesting; and further, are defined to be "interests at the same time executory future and contingent."

It may be argued that her interest is of a like nature with that of one of two persons, in favour of the survivor of whom a gift is to take effect, which is said to be a mere possibility. But her interest is swallowed up or merged in the estate of the husband upon her death; he does not take the same interest which would have vested in her, had she survived him; so that this analogy is not perfect.

Let us glance at several instances of naked possibilities, and see if the wife's interest comes within a description which would include them. The heir has a possibility of succeeding to his ancestor's estate. A devisee, named in the will of a person living, has a possibility of receiving the benefit of the devise. But has either of them more? It cannot be said that either one has any *interest*, in addition to the possibility; for, though we have an instance above of a purchaser bargaining with the heir for his chances, still the ancestor may disinherit the heir without his consent, by making a will, and the purchaser takes nothing; and the devisee again may be deprived of all possibility of taking under the will by its cancellation, or the making of a new one; and this, even in opposition to his dearest wishes. In what position does the wife stand when compared with these? She is the certain object of the interest termed "right of dower," as the heir apparent is the ascertained person to succeed to the estate of the ancestor; or the devisee, the person fixed to take under the will in which he is named. In what, then, does her position differ from that of either of these? In this, that she has an interest which, without her consent, *cannot be diverted* from the course in which it will gravitate in case she survives her husband. While the heir and devisee may each be deprived, without their consent, of their present rights, the widow has such an interest coupled with the possibility of surviving her husband as she cannot be divested of, except by her own consent; and for which, upon parting with it, even to the person owning the estate out of which it is to be enjoyed, she is at liberty to ask a *quid pro quo*. Since she has something which she may demand a consideration for, upon parting with it, it can hardly be denied that this something which may one day become an actual vested estate in lands, may be called an *interest*. It must be admitted that it is, at least, a contingent one. That it is a future one, or one to be enjoyed, if at all, in the future, will not be disputed. That it is a possibility, is obvious. And that the possibility is coupled with an *interest*, depends not solely upon the value of the above arguments, but has the sanction of the opinion of an eminent conveyancer. (Leith, R. P. Stat., p. 69.) It may therefore be said to be described by some one of the above terms. Assuming this to be so, it falls within the purview of C. S. U. C., cap. 90, sec. 5; and, while the interest had already become assignable at law by the statutes above referred to, of which it is the special object; under this

Act, being included in Sec. 5, by its broad language, it becomes subject to its other provisions which affect contingent interests and possibilities. And, upon the same assumption, whatever doubt may have existed, either at Law or in Equity, with regard to the liability of this interest to seizure under execution, would seem to have been removed by section 11, which enacts that any interest which by sec. 5 "may be assigned or conveyed by any party, shall be bound by the judgment of any Court of Record, and shall be liable to seizure and sale under execution against such party, &c." If this assumption be well founded, a married woman, being possessed of such an interest, has, by the provisions of the 11th section of the Act, a species of property available, to the extent of its worth, for creditors.

Having submitted these reasons in favor of the view that the inchoate right is an assignable interest and subject to execution, I shall in my next letter attempt an examination of the case of *Allan* v. *Edinburgh L. A. Co.*, 19 Gr. 248, which is a decision to the contrary.

E. D. A.

Toronto, August, 1877.

Sheriffs Duties—Returning Fi. Fa.'s for Renewal.

To the Editor of the Law Journal.

Sir,—Of late there has been a considerable amount of discussion in regard to the duties and emoluments attached to the office of sheriff. As the matter now stands the sheriffs have been able to exercise sufficient influence at "head quarters" to have their income largely increased without incurring any further responsibility or having additional duties to perform. I do not wish to discuss whether persons holding offices of this description, which require no previous training and no intellectual attainments to qualify them to fulfil the duties attached thereto, should receive salaries equal to, and often exceeding the remuneration which is derived from the exercise of the learned professions, but I think that if the next "Omnibus Act" passed by our Local Legislature were to extend the duties of the sheriff somewhat, it might be beneficial, not only to the legal profession but to their clients also. The law with regard to an attorney's retainer to carry on a suit, I believe to be that such retainer is an authority to prosecute the suit unto the entry of final judgment only. Special instructions should, in strictness, be given to the attorney to issue execution. Writs may then be placed in the sheriff's hands which lose their priority in a year. Neither the sheriff nor the attorney is legally bound to notify the client that the writ is about to expire, and it frequently happens that the client loses his debt through neglect to renew the writs. Now in a large firm of attorneys when writs are usually issued by articled clerks, the risk would be great to the attorney if he were saddled with the responsibility of renewing writs issued on all judgments he had entered for years back perhaps; but what could be simpler than to make it the duty of each sheriff to return writs to the party placing them in his hands say a week before the day on which they expire, giving such party notice at the same time that if not renewed the plaintiff's priority would be lost?

Yours truly,

Lex.

[The suggestion is a good one, and would be of great benefit to the profession and to the public, and very little trouble to sheriffs. These officers are as well paid for doing nothing as most people, and it would be well to give them something to do for nothing, by way of variety.—Eds. L. J.]

Invaders of the Profession.

To the Editor of the Law Journal:

Sir,—During the last year I have noticed that you have referred in your journal to some peculiar "professional cards;" but I think that none of them are equal to one which came under my own observation a short time ago. It appeared in two of our country newspapers, and is as follows:

J. A. H., Notary Public, Conveyancer Life Insurance Agent, Accountant, &c., law business matters attended to. Office next door to J. F. D. N. B.—As it may not be generally known, the public are therefore respectfully notified that the law gives to the above named the exclusive right of conveyancing in this locality. And any infraction of the same is subject to penalty.

E., April 24, 1877.

This has been published for three months, immediately succeeding Mr. H.'s appointment as a Notary Public. The phraseology is, to me at least, quite unintelligible. For instance, I do not know whether or not, "law business matters" is a more comprehensive term than "legal business," and I am just as much in the dark as to what the bounds of this locality may be, and what the penalty is which would follow an infraction of Mr. H.'s right. If you could elucidate some of these points, you would much oblige,

Yours truly,

Student-at-Law.

[The number of persons likely to be intimidated by such a trick as this is doubtless very limited, and the advertiser is probably too well known in his own locality to require at our hands a label of "mad dog," or "this ferocious animal is quite harmless;" but we would suggest that the attention of the Attorney-General should be called to his dishonest, though absurd pretension, for it is evident he is not a proper person to be entrusted with the office of a Notary Public.—Eds. L. J.]

REVIEWS.

The Insolvent Act of 1875 and Amending Acts. Annotated by S. R. Clarke, Esq., of Osgoode Hall, Barrister-at-Law. Toronto: R. Carswell.

This work will supersede, to a great extent, the annotated editions of the Insolvent Act by Mr. Edgar and Mr. Macmahon. It contains the Amended Acts and brings the cases down to a later date and much more care and research have been bestowed in its preparation than in the previous works on the same subject. Mr. Clarke has most industriously collected and carefully arranged a mass of cases selected from a variety of sources; he has not merely done this, but has not been afraid to express his own opinion on points of doubt or difficulty, evidently after a full consideration of the authorities. From the wide range of the editor's research, his book will be of equal value in all the Provinces of this Dominion, for not only does he refer to the cases reported in their various courts, but gives other useful information, *ex gr.* as to articles exempt from seizure under different Provincial statutes, lists of official assignees in Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Manitoba and British Columbia, &c. We can fancy also that this volume will find considerable sale in such places in the United States as do business to any extent with Canada. Mr. Clarke has succeeded in producing a book which shews him to be a careful and industrious annotator well acquainted with the subject before him. The book will be of much practical use both to his professional brethren and to the large number of business men, such as official assignees, &c., whose duties require them to become familiar with the working of the Insolvent Acts.

CHANGES IN CIRCUITS.

The Autumn Assizes will begin at London on Tuesday, the 23rd October, instead of Tuesday, the 4th September, as stated in our last number, the commission day having been since changed.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Easter Term, 40th Victoria.

DURING this Term, the following gentlemen were called to the degree of Barister-at-Law :—

Haughton Ignatius Lennox.
Henry Peter Milligan.
Charles Henry Woodward.
Lafayette Alexander McPherson.
Elgin Myers.
James Fullerton.
Robert Scarth Smellie.
Jasi Alexander Morton.
John Folinsbee, Jr.
David Robertson.
Harry Dudley Gamble.
John James Kehoe.
John Maxwell.
Ancus Martius Peterson.
William Daniel Foss.
Campbell Wm. Sawers.
John W. H. Wilson.

The following gentlemen passed the examination for admission as Attorneys :

James Vernal Teetzel.
Thomas Gibbs Blackstock.
Lafayette Alexander McPherson.
Walter Barwick.
Elgin Myers.
Thomas E. Lawson.
James Fullerton.
Ancus Martius Peterson.
Robert Scarth Smellie.
Campbell Wm. Sawers.
J. Franklin Monk.
Malcolm G. Cameron.
John Bishop.
E. Campion.
Peter Levington Palmer.
E. H. Eddis.
Frederick Montye Morson.
Hugh Blair.
Sydenham Baldwin Hall.
W. J. Clarke.
Harry Dudley Gamble.

The following gentlemen were admitted as Students-of-the-law:

Murray Clement Biggar.
Charles Wilson Plaxton.
Wm. George Wilson.
Alex. Aird Adair.
Charles Edward Jones.
John A. Robinson.
Andrew Taylor G. McVeity.
Geo Wm. Meyer.
Thomas Smithson Hill.
Thos. Alpheus Snider.
Wm. James Nelson.
Wm. Hutchinson Hewson.
Archibald James Sinclair.

And the following gentlemen as articled clerks :

Wm. Burgess.
David Birmingham.
Francis Arneil.
John C. Delaney.
Wm. Henry Hastings.

Ordered, That the division of candidates for admission on the Books of the Society into three classe be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects :—

CLASSICS.

Xenophon Anabasis. B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law ; Ovid, Fasti. B. I., vv. 1 300 ; Virgil, Æneid, B. II., vv. 1-317 . Translations from English into Latin ; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic ; Algebra, to the end of quadratic equations ; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar ; Composition ; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne 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 of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musaeus, Stumme Liebe Schiller. Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects :—

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

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

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

THOMAS HODGINS, *Chairman.*

Osgoode Hall, Trinity Term, 1876.

Adopted by the Benchers in Convocation August 29, 1876.