The testator, by his will, left $1,500 to the wife of the plaintiff, which had been paid to her.

The defendants (the executors) filed affidavits alleging:—1st. That the plaintiff should be put to proof of his alleged claim, inasmuch as he had not shewn that testator's wife had not separated from her husband, under circumstances which would disentitle her to support and maintenance. 2nd. That the legacy of $1,500 was intended in full satisfaction of any claim of plaintiff or his wife, if any such existed.

*Held*, that the questions raised were substantially such as would be raised in an action for alimony, and that such a claim as plaintiff's must be supported by *viva voce* evidence, and not merely by affidavit.

Motion dismissed, and an action directed to be brought to prove the claim, and for the administration of the estate. Costs of the application to be costs in the cause, and to abide the event of plaintiff proving claim or otherwise. Proceedings to be commenced within one month, or the motion to be finally dismissed with costs.

*Winchester* for plaintiff.

*J. Hoskin*, Q.C., for infant defendant.

R. Caddick, solicitor, for defendants (the executors).

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Mr. Dalton, Q.C.] [May 26.

HOOD V. MARTIN.

*Agreement to sell land—Special endorsement of writ—Rule 80, O. J. A.*

A motion for judgment under Rule 80, O. J. A. The writ was endorsed for the price of land which the plaintiff had agreed to sell to the defendant. The defendant refused to carry out the contract of sale, alleging that he had made a mistake as to the land which he had agreed to purchase, in that he supposed he was purchasing another lot. He did not allege that the plaintiff was in any way accountable for the mistake. The plaintff moved for judgment under Rule 80, O. J. A., on the ground that there was no defence to the action.

MR. DALTON, Q.C.—I think the claim here cannot be effectively specially endorsed on the summons. A claim for the price of land *sold* and *conveyed* might be so endorsed, but it must be on an executed and performed consideration. Here no property passed—the plaintiff still owns the land. There is no debt, and what the plaintiff is entitled to is damages against the defendant for not carrying out the contract.

Motion dismissed with costs.

*J. H. Macdonald* for the motion.

*Meek*, contra.

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Proudfoot, J.] [June 6.

RE ALLEN; PEACOCK V. ALLEN.

*Administration—Practice—G.O. Chy. 638, et seq.*

An administration suit under G. O. Chy. 638. The defendant was the agent for the plaintiff in selling a patented invention, and the testator, by instrument under seal, became surety for him and then died, appointing by his will the plaintiff and defendant his executors.

The plaintiff claiming to be a creditor of the estate, under the agreement of suretyship, obtained from the Master at Woodstock an administration order, which also directed that if any debt was found due to the plaintiff it should be paid by the said defendant. Letters from the defendant in June 1872, admitting a debt of $260, were put in on appeal.

PROUDFOOT, J, thought the case a simple one and within the terms of G. O. Chy. 638, *et seq*, that the letters admitting the debt of $260 established a *prima facie* case in the plaintiff's favor, that the case was one peculiarly of equitable cognizance, being between a principal debtor and his surety. Before the recent changes in the law the defendant would have had no right to trial by jury, and he thought the recent legislation did not extend that right. As there did not appear to be any assets he did not think that the plaintiff could have paid himself, but independently of the question of assets the proceedings in this case were regular, and similiar to that found in *Re Greaves, Gray* v. *Tofield*, 18 Ch. D., 551. Neither did the Statute of Limitations operate as a bar; the agreement, dated 1871, being under seal, there could be no limitation under 20 years. He declined to order the reference elsewhere than to Woodstock on the ground that the Master had prejudged the case, as it did not appear that the Master was under any disability from professional or fiduciary relations with any of the parties, and it could not be as-