renew his objections at the argument on appeal, as had he insisted before, the application might have been dismissed, thus avoiding expense.

McBeath v. Sinclair, 23/342.

See also JURY, 39.

48. **Equal division of Court—Whether there is a decision.**]—The issues in this action and another being the same, it was agreed in writing by solicitors, that the decision in the other on trial and on appeal, if any, should be the decision in this. On trial of the other, judgment was for the plaintiff. On appeal the Court was equally divided, and the defendant insisted on his right to be heard on appeal in this action, contending that there had been no decision of the appeal in the other.

The Court was again equally divided:—Per Weatherbe and Meagher, JJ., that the word "decision" in the agreement meant "judicial determination," and that the order dismissing the appeal in the other case applied to this.

Per Townshend and Graham, JJ., that where the Court is equally divided, no decision has been reached, and that the appeal in this action should therefore be heard.

Naas v. Backman, 28/504.

49. **Futile appeal.**]—Defendant having been discharged by a Judge, an appeal from his decision is futile because the bond furnished having been delivered up and cancelled, the liability of the sureties cannot be restored; also because the utmost limit of time for which the defendant might have been held (Acts of 1901, c. 16) expired before the appeal was heard.

McLaughlin Carriage Co. v. Fader, 34/534.

50. **Sale appealed against taking place.**]—An appeal was taken from an order for foreclosure and sale, first to the Supreme Court of Nova Scotia, then to the Supreme Court of Canada:—Held, in the Supreme Court of Canada, that the fact that the sale had actually taken place before the hearing of the first appeal, was ground for dismissing it.

Collins v. Cunningham, 23/350, 21 S.C.C. 139.

APPEARANCE.

See PRACTICE, 1.

APPENDIX.

See SCHEDULE.

APPROPRIATION OF PAYMENTS.

See PAYMENT, 1.

ARBITRATION AND AWARD.

1. **Setting aside award.**]—Per Graham, E.J., the Judge in Chambers has no power to set aside the award of arbitrators where the reference has been voluntary, and not compulsory under R.S. 5th Series, c. 115.

Austen v. Bertram, 23/379.

2. **Setting aside award.**]—In 1889 plaintiff and defendant agreed to submit a matter of disputed boundary to arbitration. An award was made August 28th of that year. In May, 1894, plaintiff brought action for possession of the land awarded him, for trespass, etc. Defendant counterclaimed to set aside the award on the grounds that the arbitrators exceeded their jurisdiction, that defendant was not heard, that the award was made ex parte, etc.:—

Held, that though he might otherwise have succeeded, the defendant had, by his delay in moving, lost his right to question the award.

Clish v. Fraser, 28/163.

3. **Setting aside award—Mistake of law—And of fact.**]—Though an award may be set aside for a clear mistake of law appearing on its face, yet it should not be set aside for a mistaken conclusion as to fact, based upon evidence which cannot be said to be inadmissible. And a letter written by the party against whom the award has been made, making