

Chan. Div.]

NOTES OF CANADIAN CASES

[Chan Div.]

the length of showing that the courts have under that rule granted final judgment on admissions in the pleadings. There does not appear to have been any case in which it has been applied as it is here sought to be applied in respect of a counter-claim, but it seems in principle that the counter-claim must, for this purpose, stand on the same footing as an action.

[NOTE. — *The Imp. and Ont. rules are not identical.*]

NOTES OF CANADIAN CASES.

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CHANCERY DIVISION.

Proudfoot, J.]

SIEVEWRIGHT v. LEYS.

[June 14.]

Executors—Compensation—Rests—Master's report.

Although R. S. O., c. 107, sect. 41, does not render it necessary for the Court to allow compensation to an executor in every case, no matter how flagrant his misconduct, yet neglect of duty by an executor, such as retaining money in hand that should have been applied in payment of mortgage debts, and of such magnitude as to justify charging him with interest and rests, is not enough to deprive him of commission, nor even of the costs of the suit.

The course of decision has been that an executor or trustee will be allowed his commission, though he may have so managed the estate as to justify the appointment of a receiver, and to be deprived of and even made to pay costs.

In this case, therefore, where merely a balance had been found against the executor, some of the items of which were the result of a surcharge:—

Held, not such a case as to induce the Court to discharge him of his commission.

The master has authority to take the account with rests, under the ordinary reference, as against an executor, but where he declines to do so, he should be required to report the facts to enable the Court to determine on the propriety of his decision.

Quere, whether it is not the more proper course to bring the matter up on further direc-

tions with all the materials for consideration spread out on the report, rather than to appeal in such a case.

Kingsford, for the plaintiff, appellant.

Moss, Q.C., for the defendant, respondent.

Proudfoot, J.]

[June 14.]

SAYLOR v. COOPER.

Rights of way—"Premises"—Parties.

Defendant and one A. H. Saylor, being owners of adjoining lands, on December 29th, 1865, executed a deed whereby in consideration of \$30 the defendant granted to A. H. Saylor one acre of his land, not immediately adjoining Saylor's land, and the deed then proceeded thus:—"And I further convey the right of way . . . to cross my land from the highway . . . to the land owned by A. H. Saylor . . . and the said A. H. Saylor is to make good all damages . . . together with all the appurtenances thereto belonging, to have and to hold the aforesaid lands and premises with the appurtenances unto and to the use of the party of the third part, his heirs and assigns for ever."

By deed of August 20, 1872, the defendant conveyed to A. H. Saylor five acres adjoining the latter's land, but these five acres were not accessible without passing over the lands of the defendant or of some other person. By deed of January 3, 1880, A. H. Saylor agreed to sell to the plaintiff his lands—"And all rights and privileges contained in deeds from Cooper to A. H. Saylor" for \$6,000.

Held, the plaintiff was entitled to a way of necessity to the five acres conveyed by deed of August 20, 1872, for since the defendant sold them a way of necessity was acquired, by implied grant, over the land.

Held, also, by the deed of December, 1865, a right of way became appurtenant to A. H. Saylor's land, and it was not a mere way in gross that was created.

Held, also, though the word "premises" is often used as applicable to the land conveyed, there is no rule requiring it to be limited in that way, but it is wide enough to cover all that goes before in the deed, and, therefore, it could not be contended that the word "premises" in the deed of December, 1865, only applied to the land, and that the grant of the right of way was personal to A. H. Saylor.