

Ct. Ap.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

[October 13.]

PORTEOUS V. MYERS.

Creditors' Relief Act, 1880—Distribution—Costs of first execution.

Held, affirming the judgment of the County Court of Perth, that the creditor, under whose execution an amount sought to be distributed under the Creditors' Relief Act, 1880, was levied, was not entitled to priority of payment of the costs of his action.

Moss, Q.C., for the appellant.

J. P. Woods, for the respondents.

[October 13.]

KENNEY V. MCKENZIE.

Party wall—Agreement to pay for—Right under covenant.

C. and the defendant were owners of adjacent lots, and C. being about to build on his lot agreed to erect a party-wall on the dividing line, and equally on both lots, defendant agreeing to pay for the half of the front forty feet thereof when erected, and for the rear portion whenever defendant should require to use it. Subsequently C. sold and conveyed his lot to the plaintiffs in fee by deed containing the usual statutory covenants. Some years later defendant erected a building on his lot, making use of the rear part of such party-wall, by reason of which he became liable to pay \$98.65 and interest therefor, and did accordingly pay the same to C. In an action by the plaintiffs, as assignees of C.'s interest in the said land, against defendant to recover the sum so due in respect of such wall,

Held, the payment by defendant to C. was proper, and that plaintiffs were not entitled as vendees of C. to insist on payment, the right to payment of the sum stipulated to be paid for the wall not having passed by the conveyance by C. to the plaintiffs.

Aylesworth, for appellant.

Lash, Q.C., for respondent.

CHANCERY DIVISION.

Boyd, C.]

[October 28.]

RE HONSBERGER, HONSBERGER V. KRATZ.

Interest against executors—Gradation according to conduct—English rule—Canadian rule—Costs—Allowance on money received, pendente lite.

The rules developed by the English cases regulating the award of interest against executors and rustees appear to be as follows:—(1) When money is kept in the executors' hands without sufficient excuse the offence is deemed an act of negligence and the usual court rate will be charged at 4 per cent.; (2) when the executors are not only negligent but commit an act of misfeasance by expending the funds for their own benefit, or in any other way use them, the higher rate of 5 per cent. will be charged; (3) If the act of misfeasance is of such a character as to lead to the conclusion that more than this rate of interest had been made out of the money, as for instance, if it is employed in ordinary trade or in speculation, the beneficiary will be allowed the option of either having an account of the profits or having the interest taken with rests. This gradation may be approximated here, (1) By charging an executor who negligently retains funds which he should have paid over or made productive for the estate at the statutory rate of 6 per cent.; (2) By charging him who has broken his trust by using the money for his own purposes (though not in trade or speculation) at such a rate of interest as is the then current value of money; and (3) By charging him who makes gain out of his trust by embarking the money in speculation or trading adventures with the profits or with compound interest as the case may be.

The executors in this case kept considerable and constantly increasing balances in their hands from year to year, and allowed the acting executor to use the money as he pleased. It was not proved that any profit was made out of it, and no special evidence was given to show what the current rate of interest during that period was; but that the notes and mortgages held by the executors bore interest for the most part at 6 per cent. On an appeal from the report of the Master it was