

RECENT ENGLISH PRACTICE CASES,

What is protected is the communication necessary to obtain legal advice. It must be a communication made to the solicitor in that character and for that purpose. But what we are asked to protect here is this: the solicitor being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, or information of that character, and it is said that that ought to be protected because the information is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that is not only extending the rule beyond what has been previously laid down, but beyond what necessity warrants."

BRETT, L. J., was of a like opinion. He also observed that *Mostyn v. West Mostyn Coal & Iron Co. supra* gives no colour at all to the proposition put forward for the approval of the Court by the respondents, and that *Wilson v. Northampton & Banbury Junction Ry. Co. supra* is wrong, unless there was inadvertence as to some of the documents there shut out from information.

COTTON, L. J., was also of like opinion, and observed that it "is not necessary in order to enable persons freely to communicate with their solicitors and obtain their legal advice, which is the foundation of the rule, that any privilege should be extended to communications such as these." He also points out that when it is said that communications between the "representatives of the client," and the solicitor are privileged, what is meant by the word "representative" is a "person employed as an agent on the part of the client to obtain the legal advice of the solicitor."

[NOTE.—*Imp. O. 31, r. 11, 12, and Ont. O. 27, r. 4, both relate to discovery and production, but are not identical.*]

DICKS v. YATES.

Imp. J. A., 1873, s. 49—Ont. J. A., sec. 32.

Appeal—No order except that defendant shall pay costs.

In an action for infringement of alleged copyright in the title of a novel, the defendant, before trial, discontinued the use of the title. At the trial the

Judge held that the plaintiff had established his claim to copyright, and that the defendant had invaded it, but he made no order except that the defendant should pay the costs of the action.

Held, that this was not an "order as to costs only" under sect. 49 of the J. A., 1873, and that the defendant could appeal against the order.

[C. of A., July 9.—44 L. T. 662.

The above head-note sufficiently shows the facts of this case. At the trial, Bacon, V. C., who held that the whole copyright of a work entitled "Splendid Misery" was vested in the plaintiff; that the title was part of it; and that that title being the property of plaintiff, had been adopted unintentionally by the defendant; said that it was unnecessary to grant an injunction, and merely ordered the defendant to pay the costs of the action.

On appeal, counsel for respondent argued there was no right of appeal under above section of the Act, and cited,—*Re Hoskin's trusts*, L. R. 5 Ch. App. 281; *Ashworth v. Outram* (No. 2), L. R. 5 Ch. D. 943; and endeavoured to distinguish *Wilt v. Corcoran*, L. R. 2 Ch. D. 69.

Counsel for appellant relied on *Wilt v. Corcoran*, and also cited *Harris v. Aaron*, L. R. 4 Ch. D. 749.

JESSEL, M. R., held the objection could not prevail, and said:—

"Are costs, so given, costs by law in the discretion of the Court, if the plaintiff has no title? It seems to me that is not so. No one has ever heard of such an order, nor did the V. C. make such an order. The V. C. decided that the plaintiff had a title, and thereupon he ordered the defendant to pay the costs. That is the decision which is really appealed against. It seems to me that it makes no difference whether there is an actual declaration in the order that the plaintiff was entitled, or whether it was a necessary inference from the form of the judgment ordering the defendant to pay costs. It comes to the same thing. It is a decision that the plaintiff was entitled to bring the action, and therefore this is not a mere appeal for costs. I wish not to be misunderstood. I think the Court has a discretion to deprive the defendant of his costs, though he succeeds in the action, and that it has a discretion to make him pay, perhaps, the greater part of the costs, as regards issues on which the