

RECENT ENGLISH PRACTICE CASES.

of Court and keep it, whether it is paid in as a simple admission of liability (in which case of course he would be entitled to keep it), or paid in in the nature of a payment of, as it is sometimes called, 'blackmail,' to get rid of the trouble or nuisance in some way. It is paid in and the plaintiff has a right to take it out of Court, and to keep it as his own."

BAGGALLAY, L. J., said :—

"The case of *Berdan v. Greenwood*, which was followed in *Hawkesley v. Bradshaw*, L.R. 5 Q. B. D. 302, not only decided that such a form of pleading was correct and proper, or might be had recourse to under the new rules of pleading, but also indicated what the effect of such pleading would be. After the money was so paid in, it was open to the plaintiff to take the money out of Court, solely and entirely at his own option and discretion, either in full satisfaction of the demand made by him in the action (in which case he would tax his costs and sign judgment in the usual way) or to take the money out of Court, and with it go on with the action for the purpose of seeing whether he would be entitled to a larger sum than the amount paid into Court; and then in the event of his so taking the money out of Court, and of eventually there being a judgment in the defendant's favour, either arising out of there being no liability, or arising out of the fact of the money paid into Court being in excess of the amount the plaintiff was entitled to, in either view of the case the plaintiff's right to retain the money would have been clear."

BRETT, L. J., said :—

"The case of *Berdan v. Greenwood* appears to judicially decide that such an alternative and inconsistent mode of pleading is now to be allowed, and that so much of that pleading as concerned the payment into Court is to be considered as having precisely the same effect as a payment into Court had before the Judicature Act; that is to say, that, if a defendant will pay money into Court, although at the same time he denies his liability, nevertheless the plaintiff is entitled to take that money out of Court; and, if the defendant afterwards succeeds upon the question of liability, nevertheless the plaintiff is entitled to retain the money so taken out of Court. As Thesiger, L. J., in the judgment delivered by him in *Berdan v. Greenwood*, (the judgment of the whole Court, although delivered

by him), says: 'The record . . . only shows that the plaintiff has obtained, through the timidity of the defendants, something which he had no right to obtain;' that is to say, that, by the exertion of the plaintiff's solicitor in bringing the action, and the timidity of the defendant in submitting to it, the money is 'recovered or preserved' by the exertion of the solicitor."

LINDLEY, L. J., said :—

"The practical result of paying money into Court in the alternative way in which the money was paid in here will be found worked out in the judgment of Thesiger, L. J., in *Berdan v. Greenwood*, and, as I understand it, it comes to this, that the plaintiff can get the money so paid in. He can take it in one of two ways. He can either take it in satisfaction and tax his costs, which course puts an end to the action; or he can, if he likes, take the money out of Court and go on and try and get more. If he goes on and tries to get more he must prove two things, namely, the defendant's liability, and that the money paid in is not sufficient. I he chooses to do that he can, but if he fails, then, as I understand it, he is still entitled to retain what he has got already by taking out of Court the money paid in, the defendant having risked his chance of what might happen if he paid it in in that particular way."

[*The rules under Imp. O. 30 and those under Ont. O. 26 are virtually identical. It may be mentioned that the C. of A. held, further, in this case, that the money paid into Court had been "recovered or preserved" through the instrumentality of the solicitor within the meaning of sec. 28 of the Imp. Solicitors' Act 1860, (23-24 Vict. c. 127) which enables Courts of Justice to charge property recovered or preserved with payment of costs. No similar clause occurs in our Act respecting Attorneys-at-law, R. S. O. c. 140].*

JENNINGS V. JORDAN.

Imp. O. 16, r. 7—Ont. O. 12, r. 7, (No. 95)
Parties—Trustees.

Held, that under above order, trustees of an equity of redemption sufficiently represent their *cestuis que trust* in a redemption suit, no direction to the contrary having been made by the Court.

[Aug. 3. H. of L.—L. R. 6 App. c. 698.

This was an action to redeem a mortgage. It was objected that the *cestuis que trust* of