

RECENT ENGLISH PRACTICE CASES.

ceedings were in the discretion of the Court, within Imp. O. 55 (Ont. Rule 108), so that there was no appeal by reason of Imp. s. 49 (Ont. s. 32) from the order dealing with these costs.

Dec. 30—C. of A. 51 L. J. N. S. 89.

JESSEL, M. R., after remarking that it was never intended that there should be such a demurrer as this, viz., a demurrer to so much of the relief asked for as includes those costs,—since that is not a separate cause of action, but only a statement of the relief claimed,—went on to consider the question of jurisdiction, and said :—

The words of the section (Imp. s. 24, sub-s. 3. Ont. s. 16, sub-s. 4) upon which he (the third party) relied are—"with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant." Now that provision does not relate to costs, but to the same rights in respect of the defence against such a claim. It was agued that before the Jud. Act, the third party could not have been made a party to the action between the plaintiff and defendant, and that therefore his rights are interfered with, because he had a right not to be made a party at all. This, however, is a confusion between respective legal rights and a particular mode of procedure—that is, it is entirely a confusion between rights of property, which are vested rights, and rights in legal procedure. * * * If he (the third party) is made a party, he would not be exempted from costs which were incurred before he was made a party; for he may be liable to costs from the very beginning of the action. The result, therefore, is that a third party is a party to the cause, and is liable to the discretionary power of the court over costs. * * * It is therefore no answer to say that the discretion may be exercised wrongly. It may be that the third party ought not to be made a party at all, but the answer to that is that he may appeal from such an order, and if there is a *prima facie* case showing that he ought not to be made a party, he will be dismissed from the action."

BRETT, L. J., in the course of a long judgment, said :—"It seems to me that under these rules and orders, there may be a question between defendant and third party which turns out to be in common as between all the parties, and if that be clear, then the third party ought not to be made a third party; but if *prima facie* there is a question which turns out to be in com-

mon, then the third party ought to be made a third party. * * * Now what is the practice? It seems to me that the third party can be brought in, although there may be questions which are not in common between him and the plaintiff. Supposing that to be so, it would not be just or right to make the third party pay costs as between the plaintiff and defendant. The question is whether, if such a wrong were done, the third party has a right to appeal. I should, with the greatest reluctance, feel bound to construe the rules so that, if such an injustice did happen, there should be no appeal. But even if that accident were to happen, it seems to me that the third party is a party to the cause within the rules. If that be so, then the question is whether the court is at liberty to circumscribe the ordinary reading of Imp. O. 55. (Ont. rule 428) as the discretion of the court over costs. I cannot see my way to do so. If therefore any such injustice, which happily has not been the case here, should happen, there would be no remedy. As regards the demurrer, it is clearly frivolous to demur to a claim for damages."

COTTON, L. J., said :—"Under Imp. O. 55 (Ont. rule 428) the court is to have discretion over costs as between all parties to the action; and the third party having been properly served with a notice under the Jud. Act and rules, has therefore become a party to that action. It is true that Imp. O. 55 says "subject to the provisions of the Act," and we must therefore consider whether these words prevent the third party from being made liable to pay these costs, if before the Jud. Act, he could not have been made liable. Now Imp. s. 24, sub-s. 3 (Ont. s. 16, sub-s. 4) only refers to any right which the third party might have had to defend himself against any claim in another action, but not as regards costs in any action in which he is brought before the court. The Jud. Act only alters the form of procedure, and the third party is still liable to pay such costs as he would have been liable to pay if the old form of procedure had been followed. Here he has been made liable as a matter of procedure to the costs of an action to which he has been made a party. I am of opinion that the true construction of these rules is that they were intended to enable the court in dealing with proceedings in which a third party who has been brought in has raised an allegation, to make that party pay the costs