

## RECENT ENGLISH PRACTICE CASES.

*Myers v. Defries*, L. R. 4 Ex. D. 176 shows that an alternative power is vested in the Divisional Court, and that it has a jurisdiction to disallow the costs. If the Judge at the trial has made no order as to the costs, the Divisional Court has power to disallow the costs; but if he has made an order under the power vested in him, then the Divisional Court has no jurisdiction. If the order of the Judge is wrong in point of law, an application to rectify it must be made to the Court of Appeal. The present application is to alter a final judgment, and not to the alternative jurisdiction of the Divisional Court.

[NOTE.—The sections of the Imperial and Ontario Acts are not identical. It may be added that Lord Selborne in this case expresses an opinion that the decision in *Collins v. Welsh*, L.R. 5 C.P.D. 27, as to the power of the Judge at the trial over costs, is correct.]

## ROBERTS V. DEATH.

*Imp. O. 45, rr. 6, 7. Ont. O. 41, rr. 9, 10, (Nos. 374, 375).—Garnishee proceedings—Absence of suggestion by garnishee.*

Where in garnishee proceedings the money is trust money, or there is reasonable suspicion that it is trust money, the *cestui que trust* has a right under equitable procedure to come forward, provided he does so in time, and object to an order absolute being made; and he is not to be damaged by such an order merely because the garnishee will not act.

[C. of A. Nov. 18.—51 L. J. N. S. 14.

The above head-note is taken *verbatim* from the judgment of Brett, L. J., and is his own summary of the point of law and practice involved.

The following passage from his judgment makes the matter clearer:—

BRETT, L. J.—The order sought to be obtained under the garnishee proceedings was an order that a man who had obtained judgment really as trustee should pay over money so obtained to a creditor who had really no right to it. The money is the money of the *cestui que trust*; but it is said that as the garnishee made no suggestion to that effect, the *cestui qui trust* cannot make it, and that such an injustice is to be perpetrated by order of the Court. I cannot believe that such is the law. The rules are copied from sections 29 and 30 of the Com. Law Proc. Act 1860. (R. S. O. c. 50, s. 313), passed at a time when the common law courts could not give a

remedy, although the courts of equity could. This order would, under the garnishee proceedings, be made absolute by a Master acting for a Judge sitting in a Court of equity. He would, therefore, have an equitable jurisdiction, and a Court of equity would never have made an order that money belonging to a *cestui que trust* should be paid away to a person not entitled to it. The Court will not be a party to such an injustice, although the suggestion could be made by the *cestui que trust* under rules 6 and 7. It seems to me that the Court would listen to a party coming forward either upon the issue of a garnishee order or upon a summons subsequently taken out in time, and would order the money to be paid over to the claimant if the fact was clear that it was trust money, and would decline to make the garnishee order absolute if the facts as to whether the money was trust money or not were in dispute.

COTTON, L. J.—The money here is trust money, and there is obviously an equity, as in the case where goods in the hands of a trustee are not allowed by the Court to be taken in execution. \* \* \* I am not satisfied it (the case) is not within the words of rule 7, which clearly seem to give the Court or Judge power to cite any other person, although the garnishee has made no suggestion. I do not, however, rely on that. \* \* \* Under the circumstances, and independently of these rules, this money ought to have been paid into Court to abide the event of the question whether it is trust money or not.

LINDLEY, L. J.—There would have been no difficulty under the old practice, which was to file a bill and to claim an injunction; but now that injunctions have gone, there is some difficulty in seeing what is to be done. \* \* \* The Court ought, in my opinion, to make an order under rule 7 that the money be paid into Court to abide the event of the enquiry whether it is trust money or not.

[NOTE.—*Imp. O. 45, rr. 6, 7 and Ont. O. 41, rr. 9, 10 are identical.*

## CLARBROUGH V. TOOTHILL.

*Imp. J. Act, 1873, ss. 3, 16—Ont. J. Act, ss. 3, 9; Rule 2.*

[June 23. M. R.—50 L. J., 743.

Where an Act passed before the Judicature Act, and referring in terms to common law actions only, empowered a Judge by rule or order