

RECENT ENGLISH PRACTICE CASES.

not always with the knowledge or express sanction of C.

The cases immediately following the last mentioned one, are on questions relating to the Borough Franchise and Lodger Franchise in England, occupying p. 195—p. 262, and are rather of political than legal interest, and need not be further noticed here; while we must postpone our review of the remaining contents of this number, as also of the March number of the Chancery Division until our next issue.

REPORTS.

RECENT ENGLISH PRACTICE CASES.

(Collected and prepared by A. H. F. LEEFROY, Esq.)

FOWLER V. BARSTOW.

Imp. O. 11, r. 1; Ont. Rule No. 45.

Motion to discharge order for service of writ out of jurisdiction.

Defendant, in moving to discharge such an order, may shew by affidavit that no cause of action has arisen against him within the jurisdiction.

Nov. 30—C. of A., 51 L. J. N. S. 103.

JESSEL, M. R., after referring to the practice in the above matter before the Judicature Act, and pointing out that both at Common Law and in Equity, the practice was to allow the defendant to put in a conditional appearance, and then to file such an affidavit, said:—

"That being so, the practice as to the admissibility of affidavits to contest the question whether or not the cause of action arose within the jurisdiction was the same both in Courts of Equity and Courts of Common Law; and consequently it is still the practice. Therefore the affidavit is admissible for this purpose. I must not be supposed to decide that the affidavit is admissible to contest the merits of the action. It is not the proper time to try the merits of the action. It is the proper time to try whether the action should be heard in England or in some other country. The question of *forum* is the only question to be tried."

BAGGALLAY, L. J., said in the course of his judgment:—"I quite think that, upon an application to discharge such an order as was made in this case, an affidavit may be made for the

purpose of shewing that the Court had no jurisdiction to make an order; but I do not think, as at present advised, it ought to go beyond that unless there were some case of gross fraud or perjury or something of that kind. In ordinary circumstances the affidavit ought not to go beyond the mere fact of shewing there is no jurisdiction to make an order. It may well be that, in order to make a sufficient affidavit for that purpose, it is essential, in some respects, to deal with the merits of the case."

LUSH, L. J. said:—"The difference of procedure was this: The plaintiff, under the C. L. Proc. Act, issued his writ at his own peril; and when he came to act upon it and to apply to the Court to allow him to proceed on the service of his writ, then arose the question whether the cause of action accrued within the jurisdiction or not; and although the question arose at that different stage, it was then open to the defendant to contest the matter upon evidence—upon counter affidavits. The Judicature Act requires leave to be given before the writ is issued at all, which I think is a very great improvement. In each case the practice is the same. * * * In the first instance the order is necessarily *ex parte*, and for this reason: if the person is a party residing abroad, you could not serve a writ upon him out of this Court, because that would be an affront to the sovereign of the country; and therefore you must issue the order *ex parte*, leaving it to the defendant to come in to apply to set aside that order.

NOTE.—*The Imp. and Ont. rules are virtually identical.*

HORNBY V. CARDWELL.

Imp. Jud. Act, 1873, s. 24 (sub-s. 3) and s. 49, O. 16, r. 18; O. 55, r. 1.—Ont. Jud. Act, s. 16 (sub-s. 4), s. 32.—Rules No. 108. 428.

Third party—Costs—Appeal.

Judgment having been given in a certain action against the defendant, who, in his pleadings, claimed from H., who had been made a third party under Imp. O. 16, r. 18 (Ont. Rule No. 108), the amount of the judgment and the costs of defending the action, H. demurred to the claim for costs, but the Divisional Court overruled the demurrer, and ordered H. to pay all the costs of the action. Held, H. having been properly made a third party, the costs of all the parties