

RECENT ENGLISH PRACTICE CASES.

of the High Court as such it is subject to appeal under sec. 19 of the Jud. Act, 1873.

[NOTE.—*The provisions of Imp. J. A. 1873, sec. 19, are comprised in terms virtually identical in Ont. J. A. secs. 13, 14, 15.*]

POYSER V. MINORS.

Imp. O. 41, r. 6, O. 36, r. 18—Ont. O. 37, r. 6, (No. 330.) O. 31, r. 15, No. 268.

[C. of A., June 30.—19 W. R. 773.
L. R. 7 Q. B. D. 329. 50 L. J. R. 555.]

The order the interpretation of which was in question in this case, was *Imp. Co. Ct. Rules 1875, O. 16, r. 17*; but this County Court rule is a copy of *Imp. O. 41, r. 6, Jud. A. 1873*, and it is to be noted that the judgments contain some lengthy observations on the said *O. 41, r. 6*, which is virtually identical with our Order 37, r. 6.

The following passage occurs in the judgment of BRAMWELL, L. J. :—

"This rule (*O. 41, r. 6, J. A.*) has always been a difficulty to me. It supposes a "judgment" of non-suit may be given. There really in strictness never was a "judgment" of non-suit. No plaintiff could be non-suited against his will. * * * * If he insisted on appearing, he could not be non-suit. The expression then, "judgment of non-suit" seems inaccurate. But setting aside this difficulty, which, were it necessary, I could show is not merely verbal, I have never been able to see when under the other rules a non-suit can happen. I need not discuss non-suits before trial. None are provided for by the rules. Now, what is to happen at the trial? By *O. 36, r. 18.*" (*Ont. O. 31, r. 15, No. 268*) "if plaintiff appears and defendant does not, plaintiff may prove his claim. What is to happen if he does not is not said. I should have thought verdict and judgment for defendant if the case was before a jury, judgment for him if not. Was it contemplated that a Vice-Chancellor should non-suit? Suppose plaintiff insists on appearing? What is the use of a non-suit if it is a bar to a future action unless

ordered to the contrary? And if it may be, and is, why could not the power be given to the judge or Court to say that any judgment of whatever kind should not be a bar if so ordered? * * Rule 18 seems the only one under which such a judgment (*i.e.*, of non-suit) can be given. * * It seems strange that such a judgment can be given only where the plaintiff appears and defendant does not. I cannot but doubt whether *O. 41, r. 6*, did not slip in *per incuriam* and whether it can be applied, now especially. However there it is, and it has been acted upon and probably would be supported if possible."

[NOTE.—*Imp. O. 41, r. 46, and O. 37, r. 6, are virtually identical; and Imp. O. 36, r. 18, and Ont. O. 31, r. 15, are identical.*]

BECKET V. ATTWOOD.

Appeal by one plaintiff—Co-plaintiff refusing to join in appeal.

One of two plaintiffs may appeal, although his co-plaintiff refuses to join in the appeal. The co-plaintiff should be made a respondent.

[C. of A., May 10.—29 W. R. 786. 44 L. T. 660. 50 L. J. R. 637.]

In this matter one of the plaintiffs appealed. The other refused to join in the appeal, and was therefore made a respondent.

In support of the objection that the appeal was defective was cited *Drake v. Symes*, 9 W. R. 427, 3 De. G. F. & J. 491, and *Jopp v. Wood*, 2 De. G. J. & S. 323, 13 W. R. Ch. Dig. 76.

In support of the appeal were cited *Colvin v. Hartwell*, 5 Cl. and Fin. 484; *Hanson v. Keating*, 4 Ha. 1, and 2 Seton on Decrees, 1605.

JAMES, L. J.—The objection must be overruled. If one plaintiff is dissatisfied with the judgment of the Court, he ought not to be prejudiced in his right to appeal, simply because his co-plaintiff does not wish to risk the consequences of further litigation. If the plaintiff who is made a respondent has any reason to doubt about the security of his costs, if successful, he should apply that the appellant may give security under *O. 58 r. 15*.

[NOTE.—*Our orders under the J. Act contain no order similar to Imp. O. 58, r. 15, but cf. R. S. O., c. 38, sec. 26.*]