

CURRENT CASES IN ONTARIO.

the examination of the witness must be first obtained." In Holmsted's Manual, p. 206, it was suggested that the proper construction of this Rule was, that it should be deemed to afford an additional remedy rather than as being a substitution for the former procedure under Order 256.

The point we see has been recently before the Court of Appeal in England in the case of *Raymond v. Tapson*, 48 L. T. 403. In that case oral evidence was sought to be given after judgment in reference to the accounts directed to be taken. The plaintiff, without order, issued a *subpœna*, which the witness, under advice of counsel, refused to obey, the contention being that the former practice under the Imp. statute 15-16 Vict. c. 86, ss. 40-41, from which our Chancery Order 266 is taken, had been superseded by the Order 37, r. 4, from which our Rule 285 is taken, but the Court of Appeal decided that the former procedure in Chancery was still in force, and that there was no irregularity. The correctness of *Monaghan v. Dobbins*, therefore, seems now open to considerable doubt.

IN the case of *Meyers v. Kendrick*, 9 P. R. 363, Mr. Justice Osler appears to have adhered steadfastly to the decisions of the Common Law Courts, and following those decisions has determined that where a plaintiff's action is dismissed with costs, the defendant has no right to examine the plaintiff as a judgment debtor, either under the rule of the Supreme Court or the statutes. There seems to be no good reason in principle why a plaintiff who has become liable to pay costs in this way should not be subject to examination, and we are moreover morally certain that the Legislature never intended to make any such exception in his favour; and it seems to us that it is only by a very strict construction of the rules and statutes that the exception is made out to exist. Rule 366 provides that a judgment debtor may be examined touching his estate and effects, and

as to the property and means he had "when the debt or liability which was the subject of the action in which judgment has been obtained against him was incurred," and it is said that these words exclude the possibility of the rule being intended to apply to cases where a plaintiff is defeated in his action and ordered to pay the defendant's costs. On the other hand it appears to us it might not unreasonably be said that as soon as a plaintiff issues a writ he submits himself to the jurisdiction of the Court, and incurs "a liability" to pay the defendant's costs in the action if so ordered by the Court, and that this liability for costs, therefore, is one of "the subjects of the action," so far as the defendant is concerned. It may not be the sole subject of the action, and it is not necessary that it should be, otherwise if a plaintiff sued on two promissory notes and recovered judgment on one and failed on the other, he could not examine the defendant because the note for which he recovered judgment would not be "the sole object of the action"—a conclusion which would be absurd. All that the rules or statutes require is that the judgment should be in respect of a liability which was the subject, or one of the subjects of the action in which the judgment is recovered, and it appears to us that a judgment for the defendant against the plaintiff for costs fulfils this condition. It is absurd to say as a matter of theory that the costs are no part of the subject of the action; when as a matter of fact it is well known that in many cases the costs in the end form the most material part of the subject-matter in controversy, not only to the solicitors, but to the litigants themselves. Take for instance the celebrated case of *McLaren v. Caldwell*. In that case it is not too much to say the costs will in the end probably form one of the, if not the most substantial parts of the subject of that protracted litigation.

The question of costs appears to us to be a substantial part of the subject of every action; and the case of a defendant recovering judgment against a plaintiff for costs is, to our