REPORTS

RECENT ENGLISH PRACTICE CASES.

BURRARD v. CALISHER.

Imp. Jud. Act, 1873, sect. 50 — Ont. Jud. Act. sect. 47—Motion to vary report of official referee.

CHITTY, J.—In my opinion—and I wish to lay down this as the rule of practice I purpose to adopt in my Court where, in an action which has by the judgment been referred to the official referee, and in which the further consideration has been adjourned, either party to the action desires to vary the report, he should serve the opposite party with a notice of motion to vary. This notice of motion should be given for the usual motion-day in this branch of the Court; but when the motion is mentioned it will be ordered to be adjourned, as a matter of course, to come on with the further consideration. Where the further consideration has not been adjourned, then the practice which was laid down by the Master of the Rolls should be adopted; that is to say, the requisite notice should be given either by motion or summons to vary.

[NOTE.—*The Imperial and Ontario sections are nearly, but not quite, identical. Another matter arising in this case is noted* supra *p. 180.*]

ABBOTT v. ANDREWS.

Imp. O. 55, r. 1; Ont. rule 428—Costs Jury trial—Nonsuit on some issues — Procedure when judgment ambiguous as to costs.

When in an action tried by a jury, the plaintiff succeeds upon some issues but is nonsuited upon others, and no order is made as to costs, the defendant is entitled, under the above rule, to the costs of the issues upon which the plaintiff is nonsuited.

When a judgment is ambiguous as to costs, the proper course is, not to appeal from the Master's order refusing to tax the costs of one of the parties, but to apply to the Judge who tried the case to correct any ambiguity in the judgment.

LORD COLERIDGE, C. J., and GROVE, J.

April 25.—L. R. 8 Q. B. D. 648.

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

LUMSDEN v. WHITE.

Imp. O. 29, r. 12; O. 40, r. 11—Ont. Rules 176, 322.

Final judgment on defence and counter-claim.

Where plaintiff makes default in delivery of reply to the defendant's statement of defence and counter-claim, the latter may obtain an order for final judgment in respect of both claim and counter-claim, under rule 322.

April 28—L.R. 8 Q.B.D. 650.

Action for unliquidated damages for breach of contract and statement of claim accordingly. The statement of defence denied the allegations of the statement of claim and counter-claimed for money lent by the defendant to the plaintiff. The plaintiff having made default in delivery of reply, the defendant moved for judgment against the plaintiff on the claim and counter-claim.

GROVE, J.—The provisions of the rules with regard to counter claims are not very distinct so far as this point is concerned, but Imp. O. 19, r. 3, (Ont. Rule 127), which says that a counter-claim shall have the effect of a statement o claim in a cross action, seems to be applicable in this as in other cases. That being so, the counter-claim here is in the same position as if it had been a statement of claim. Then by Imp. O. 29, r. 12, (Ont. Rule 176), if no reply is delivered, the pleadings are to be deemed closed, and the statements of fact in the pleading last delivered are to be deemed to be admitted. It must be taken, therefore, in this case, that the statements of fact in the counter-claim are admitted. Then by Imp. O. 40, r. 11, (Ont. Rule 322), the defendant may move for any order to which he is entitled on admissions in the pleadings. I must admit I should have been inclined to think that this rule was not applicable to the present case but for the decisions on the subject. . . . It seems, however, that Courts of co-ordinate jurisdiction have held it to apply to final judgments, and by their decisions we are bound. So construing the rule the case seems, by virtue of the other rules to which I have referred, to be brought within it, and the defendant appears to be entitled to the counter-claim as well as the claim.

LOPES, J.—If there had been no decision on the subject, I should have been inclined to doubt whether Imp. O. 40, r. 11, (Ont. Rule 322), applied to final judgment or only to interlocutory measures of relief, but the decisions seem to go