

RECENT ENGLISH PRACTICE CASES.

defendant fails, or in respect of misconduct by the defendant in the course of the action. But, in my opinion, a judgment like this, for the whole costs of the action, cannot be supported without an express or implied decision that the plaintiff was entitled to bring the action. Therefore I think the appeal should proceed."

JAMES, L. J.—"I am of the same opinion. I should add that there is an essential difference between the plaintiff and a defendant. A plaintiff may succeed in getting a decree, and he may have to pay all the costs of the action; but the defendant is dragged into court."

[NOTE.—*Imp. J. A.*, 1873, sec. 49, and *Ont. J. A.*, sec. 32, are identical.

RANSON V. PATTEN.

Imp. J. A., 1873, sec. 52, O. 50, r. 4—*Ont. J. A.* sec. 41. O. 44, r. 3 (No. 385).

Dismissal of action—Death of plaintiff—Appeal,—Revivor.

[C. of A., May 20—44 L. T. 688.

This action was tried before Bacon, V. C., when he gave judgment of the foreclosure claimed by the plaintiff, and dismissed the counter-claim with costs.

The defendant gave notice of appeal, and after it had been set down for hearing, died. His executrix obtained an order of course on petition at the Rolls under *Imp. O. 50 r. 4*, giving leave to continue proceedings.

Counsel for respondents raised the preliminary objection that the executrix ought to have applied to the Court of Appeal, under *Imp. J. A.*, 1873, sec. 52.

JESSEL, M. R.—Under the practice of the Court of Chancery the suit was revived by bill of revivor in the original Court. This is a proceeding in the action. The only proceeding there is in the action is an appeal. The Court of Appeal has no original jurisdiction, as every appeal is now by way of rehearing. The plaintiff took a very convenient and proper course in obtaining an order at the Rolls.

[NOTE.—*Imp. J. A.*, 1873, sec. 49, and *Ont. J. A.*, sec. 32 are identical. *Imp. O. 50 r. 4*, and *Ont. O. 44, r. 3*, (No. 385) are identical, except that under the former the order to add parties, though it may be obtained *ex parte*, cannot be obtained *on procipe*.

WITHAM V. VANE.

Imp. O. 16—Ont. O. 12 (No. 89-114.)

Third parties—Costs.

Where third and fourth parties had been brought in—*Held*, that there is no jurisdiction to order the plaintiff to pay the costs of the third and fourth parties, and that as there was no disputed question of fact relating to them, but only a question of liability as between the plaintiffs and defendants, there should be no order as to the costs of the third or fourth parties.

C. of A., May 9.—44 L. T. 718.

This was an action on a covenant for payment of a certain sum or rent-charge, contained in a deed of sale to the Duke of Cleveland, deceased. After the commencement of the action, the defendants, who were the representatives of the said Duke, brought in as third parties the Hutton Henry Company, who were assigns of part of the land subject to the rent-charge. The Company brought in as fourth parties, Messrs. Horn and Saunders, who under the deed of conveyance to the company had a term vested in them to secure the rent reserved in the said deed to the company, and the company also brought in as fourth parties Messrs. Davis and Greaveson, who by deed of even date with the deed to the company were under covenant to indemnify the company against the rent charge reserved in the original deed to the Duke of Cleveland.

In June, 1880, FRY, J., ordered the plaintiffs to pay the costs of the third and fourth parties, but made no order as to the other costs of the action, considering neither plaintiff nor defendant absolutely in the right.

The plaintiffs appealed, and the defendant gave the usual respondent's notice that the order might be further varied in their favour.

Counsel for the appellants urged that the Judge's order as to costs was irregular, in so far as it directs the plaintiffs to pay the costs of the third parties, and cited *Dawson v. Shepherd*, 42 L. T. N. S. 611; *Swansea Shipping Co. v. Duncan*, L. R. 1, Q. B. D. 644.

Counsel for the third parties said they did not ask for costs against the plaintiff, but that there was ample jurisdiction to make the defendants pay them, and cited *Dawson v. Shepherd*, 42 L. T. N. S. 611, and *O. 16 r. 21 (Ont. O. 12 r. 23)*. They also urged there was no